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John O. Geism

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 63

JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER SEC-  
TION 206 OF THE TRANSPORTATION ACT, 1920, PETI-  
TIONER,

VS.  
JOHN O'HARA

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE  
OF VERMONT

WRITING AND CERTIFICATE FILED MAY 2, 1925

RECEIVED AND RETURN FILED JULY 21, 1925

(30,000)

William

78 Feb 779

262 per O'Hara

(29,609)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 326

JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER  
SECTION 206 OF THE TRANSPORTATION ACT, 1920,  
PETITIONER,

*vs.*

JOHN O'HARA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA.

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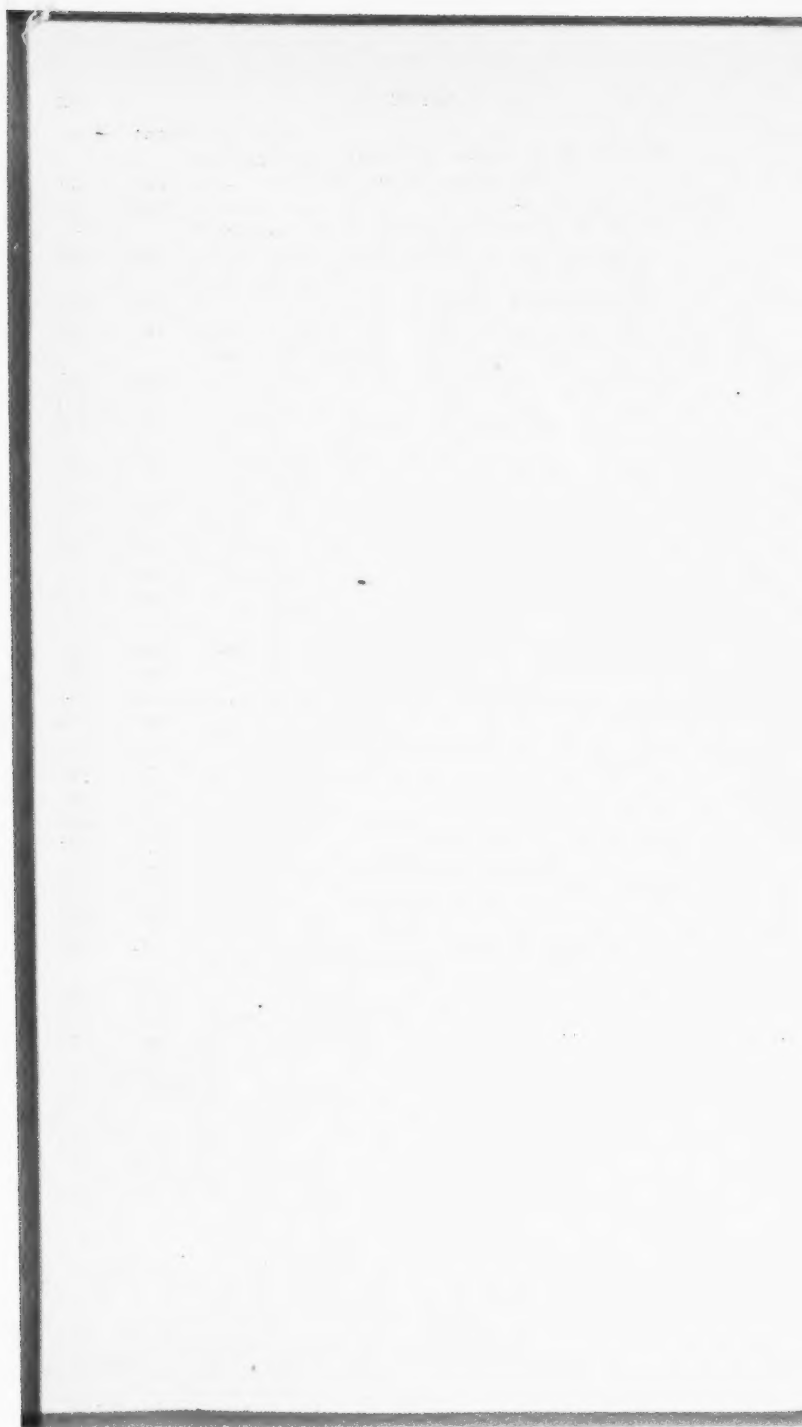


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1

No. 23057.

O'HARA

v.

DAVIS.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 1st Day of January, 1923.

Present: Hon. Andrew M. Morrissey, Chief Justice; Hon. Charles B. Letton, Judge; Hon. William B. Rose, Judge; Hon. James R. Dean, Judge; Hon. Chester H. Aldrich, Judge; Hon. George A. Day, Judge; Hon. Edward E. Good, Judge.

Attest, H. C. Lindsay, Clerk.

Be it remembered, That on the 1st day of September, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, in the words and figures following, to wit:

2

**IN THE SUPREME COURT OF NEBRASKA.**

JOHN O'HARA, Plaintiff,

vs.

JAMES C. DAVIS, Agent of the President under Section 206 of the Transportation Act of 1920, Defendant.

**Præcipe.**

[Filed Sept. 1, 1922.]

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 1st day of July, 1922 in a certain cause in the District Court of Douglas County, Nebraska, wherein John O'Hara was plaintiff and James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, was defendant.

You will designate the above named James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, as appellant, and said John O'Hara as appellee.

Please issue notice of appeal for the above named appellee.

C. A. Magaw, Thos. W. Bockes, Douglas F. Smith, Attorneys for Appellant.

[File endorsement omitted.]

3 And on the same day, to wit, 1st day of September, 1922,  
there was filed in the office of the Clerk of said Supreme Court,  
a certain Transcript in the words and figures following, to wit:

4 Pleas Before the Honorable L. B. Day, One of the Judges  
and the Presiding Judge of the District Court of the  
Fourth Judicial District of the State of Nebraska, at a  
Term Thereof Within and for the County of Douglas  
Begun and Held at the City of Omaha on the 1st Day  
of May, A. D. 1922.

Be it remembered, That in a certain cause, heretofore pending in  
the District Court of Douglas County, State of Nebraska, entitled  
John O'Hara, a minor by his next friend Frank J. O'Hara vs.  
Walker D. Hines, Director General of Railroads appearing on Docket  
172 Number 108 there was filed in the office of the Clerk of said  
Court on the 9th day of February 1920, a certain Petition which  
said Petition is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Petition.**

[Filed Feb. 9, 1920.]

1. Comes now plaintiff and alleges that he is a minor 18 years  
of age and brings this action by his father and next friend, Frank  
J. O'Hara.

2. Plaintiff alleges that Walker D. Hines, Director General of  
Railroads at all times complained of was operating the railroad  
lines, tracks and all equipment of the Union Pacific Railway Com-  
pany in Iowa, Nebraska and other states of the Union.

3. That defendant in the operation of said railway was engaged  
in interstate business and maintained a "gantry" or a very hazard-  
ous piece of machinery erected across about three or four parallel  
tracks so as to run up and down said tracks several hundred feet  
carrying a crane used to hoist and transfer entire loads or  
5 immense loads from bad order cars upon one track to good  
order cars upon a parallel track.

4. Plaintiff alleges that said machinery known as a "gantry" was  
maintained for and was being used for interstate commerce or to  
transfer lumber and steel in transit for long hauls from one state  
to another and through the state of Iowa.

5. That plaintiff was employed as an operator or workman with  
other men upon said "gantry" which machinery and men were  
employed in transferring car loads of interstate shipments of freight  
from bad order cars to cars in good order upon the said railroad  
lines and the said machinery and men including plaintiff was being

used for said purpose and in said interstate work at the time of the injury of which complaint is made.

6. That on the 13th day of September, 1919, while plaintiff was so engaged in the employ of defendant upon said "gantry" and machinery for transfer aforesaid upon interstate traffic he was particularly engaged at repairing one of the cables of said "gantry" which had just immediately before been used and was to be immediately used for said interstate traffic and was preparing it to be used in transferring a car load of telephone or telegraph poles coming from some state east of Iowa and going to some state west of Iowa when plaintiff was injured as later alleged.

7. Plaintiff alleges that said cable had been stretched and fixed upon said "gantry" by said employees of defendant as a part of said duties and the end of the cable was incomplete and rough and the wires exposed in such a dangerous way that the foreman directed said employees including plaintiff that said ends be wrapped with cloth and tied down in a manner similar to which other cables were treated thereon.

8. Plaintiff alleges defendant had neglected to provide wires, repairs, tools and machinery proper for the operation of said "gantry," and there was no wire upon said machinery or thereabouts for such use and the foreman directed his subordinates to procure wire to complete said work.

9. Plaintiff alleges one of said employees sought wire in an empty coal car from which a load of material had been received for a similar purpose shortly before and finding a piece of small wire he brought it to said foreman who accepted same and directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition.

10. Plaintiff alleges that said subordinate employees upon said machinery undertook to use said wire for said purposes which wire had been retained and while the foreman and one of defendant's employees aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purposes alleged.

11. Plaintiff alleges there was what appeared to him to be a small metal bulb or cylinder on the end of said wire which interfered with its use and which plaintiff in the performance of his duty undertook to remove so as to be more convenient in completing said work when by the act of removing the same it exploded.

12. Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

13. Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both of his eyes will have to be removed.

14. Plaintiff alleges he was in good health up to the time of said injury and had an expectancy of life exceeding 42.87 years and was

earning \$3.44 per day with prospects of increasing his earning ability.

7 15. Plaintiff alleges that by reason of said conduct and resultant injuries he has suffered and sustained damages in the sum of One Hundred thousand (\$100,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of One Hundred Thousand (\$100,000.00) dollars with costs of suit.

John O'Hara, By Frank J. O'Hara, By his  
Attys. Jno. Q. Yeiser, J. C. Travis.

STATE OF NEBRASKA,

*County of Douglas, ss:*

Frank J. O'Hara of lawful age being first duly sworn deposes and says that he is the father and next friend of the plaintiff, John O'Hara; that said John O'Hara is a minor of the age of 18 years; that affiant has read the above and foregoing petition, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Frank J. O'Hara.

Subscribed in my presence and sworn to before me this 9th day of February, 1920.

John C. Travis, Notary Public. (Seal.)

[File endorsement omitted.]

Afterward, on the 9th day of February, 1920, a Summons was issued herein which said Summons is in the words and figures following, to-wit:

**Summons.**

[Filed Feb. 25, 1920.]

STATE OF NEBRASKA,

*Douglas County, ss:*

The State of Nebraska to the Sheriff of Douglas County, Greeting:

8 You are hereby commanded to notify Walker D. Hines, Director General of Railroads, Defendant that he has been sued by James O'Hara, a minor by his next friend Frank J. O'Hara, Plaintiff in the District Court of said County, and that he must answer on or before the 15th day of March A. D. 1920, the petition of said Plaintiff filed against him in the office of the Clerk of said Court, or such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this Summons on the 23rd day of February A. D. 1920.

**Sheriff's Return.**

**5**

Witness my signature and the seal of said Court at Omaha, this 9th day of February A. D. 1920.

Robert Smith, Clerk, By Asel Steere, Jr.,  
Deputy. (Seal.)

Endorsed: Doc. 172. No. 108. District Court, Douglas County, Nebraska, James O'Hara, a minor by his next friend Frank J. O'Hara vs. Walker D. Hines, Director General of Railroads, Summons. If Defendant fails to appear and answer, the plaintiff will take *judgment* for \$100,000.00 and costs of suit. Attest: Robert Smith, Clerk, by Asel Steere, Jr., Deputy. John O. Yeiser, J. C. Travis, Plaintiff's Attorney-. Received Sheriff's Office, Feb. 10, 9:11 A. M., 1920, Douglas County, Nebraska.

[File endorsement omitted.]

Afterward, on the 25th day of February, 1920, Return of said Summons was made by the Sheriff and filed herein which said Sheriff's Return is in the words and figures following, to-wit:

**Sheriff's Return to Summons.**

[Filed Feb. 25, 1920.]

STATE OF NEBRASKA,  
*Douglas County, ss:*

Received this writ on the 10th day of February, 1920, and served the same on the 12th day of February, 1920, on the within named Walker D. Hines, Director General of Railroads, by delivering 9 to E. E. Calvin the person in charge of the operation of Union Pacific Railroad Company, for said Walker D. Hines, Director General of Railroads, personally in Douglas County, Nebraska, a true and duly certified copy of this writ with all the endorsements therein.

Michael L. Clark, Sheriff, By P. J. Welch,  
Deputy.

Fees .....	.75
Mil. ....	.10
	<hr/>
Total .....	.85¢

Afterward, on the 8th day of March, 1920, a Special Appearance was filed herein which said Special Appearance is in the words and figures following, to-wit:



In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Special Appearance and Motion to Quash Summons.**

[Filed Mar. 8, 1920.]

Comes now said Defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the Court over the person of the defendant and over the subject matter of this action, moves the Court to quash the summons herein, and as grounds therefor alleges:

That General Orders Nos. 50, 50-A, 18, 18-A, and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits "A," "B," "C," "D," and "E," respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that  
 10 the pretended cause of action set forth in his petition did not arise in said County and State; and that this action is wrongfully brought therein.

Walker D. Hines, Director General of Railroads,  
 By C. A. Magaw, Thos. W. Boekes, His Attorneys.

**Exhibit "A" to Special Appearance.**

United States Railroad Administration.

*General Order No. 50 of Director General McAdoo.*

The following order was issued by W. G. McAdoo, Director General of Railroads, under date of October 28, 1918:

"Whereas, By the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes \* \* \* but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such; and

*Formal  
The substance.*

"Whereas, The Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State of Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President;' and

"Whereas, Since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters  
11 based on causes of action arising during Federal control for which the said carrier corporations are not responsible and it is right and proper that the actions, suits and proceedings herein-after referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations;

"It is therefore ordered, That actions at law suits in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceedings but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

"Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

12 "The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process of law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding."

**Exhibit "B" to Special Appearance.**

United States Railroad Administration.

*General Order No. 50, of Director General McAdoo.*

The following order was issued by Mr. Walker D. Hines, Director General of Railroads, under date of January 11, 1919:

"General Order No. 50, issued October 28, 1918, is hereby amended to read as follows:

"It is therefore ordered, that actions of law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

"Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service or process in any such action, suit or proceeding may be made upon operating officials operating for the Director General  
13 of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

"The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process or otherwise in respect of any such cause of action or proceeding."

**Exhibit "C" to Special Appearance.**

United States Railroad Administration,  
Office of the Director General,  
Washington.

April 9, 1918.

*General Order No. 18.*

Whereas the Act of Congress approved March 21, 1918, entitled An Act to Provide for the Operation of Transportation Systems While Under Federal Control, provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President.

\* \* \* But no process, mesne or final, shall be levied  
14 against any property under such Federal control;" and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McAdoo, Director General of Railroads.

**Exhibit "D" to Special Appearance.**

Copy.

United States Railroad Administration,  
Office of the Director General.

April 18, 1918.

*General Order No. 18-A.*

General Order No. 18 issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

W. G. McAdoo, Director General of Railroads.

15 **Exhibit "E" to Special Appearance.**

United States Railroad Administration.

Washington, May 22, 1919.

*General Order No. 18-B.*

General Order No. 18, issued April 9, 1918, as amended by General Order No. 18-A, issued April 18, 1918, is hereby further amended to read as follows:

It is therefore ordered, That all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; or where the cause of action would but for Federal control accrue against the initial carrier (as under section 20, paragraph 11, of the Act to Regulate Commerce), such action may be brought in the county or district where the property was received for transportation.

Walker. D. Hines,  
Director General of Railroads.

119358-19.

[File endorsement omitted.]

Afterward, at the February 1920 Term of Court and on the 13th day of March 1920 an Order was entered herein as appears on page 674 Journal 169 as follows, to-wit:

16

In the District Court of Douglas County.

[Title omitted.]

**Order Overruling Special Appearance.**

Now, on this day, this cause came on to be heard upon the special appearance of defendant, upon consideration whereof, being fully advised in the premises, the court does overrule said special appearance, to which ruling of the court defendant excepts, and, upon application therefor, is hereby given ten (10) days in which to plead. ✓

Afterward, on the 17th day of March 1920 an Answer was filed herein which said Answer is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

No. 108.

[Title omitted.]

**Answer.**

[Filed March 17, 1920.]

1. Comes now said defendant, Walker D. Hines, Director General of Railroads, and alleges that heretofore and on the 8th day of March, 1920, he appeared specially and objected to the jurisdiction of this Court over the person of the defendant and over the subject matter of this action, and moved the Court to quash the summons herein on the ground that General Orders of the Director General of Railroads, Nos. 50, 50-A, 18, 18-A and 18-B, copies of which are hereto attached, marked Exhibits "A", "B", "C", "D", and "E", respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the County or District where the cause of action arose. That thereafter, and on the 13th day of March, 1919, the District Court of Douglas County, Nebraska, overruled said motion.

17 2. Defendant further alleges that he still objects to the jurisdiction of this Court over the person of the defendant and over the subject matter of this action, and alleges that this action is wrongfully brought in said Court because the said plaintiff was at no time employed by the defendant in this County or District, and was not injured in said County or District, but injured his eyes in Council Bluffs, Pottawattamie County, Iowa, of which said City, County and State he was a citizen and resident at all the times mentioned in plaintiff's petition; and defendant alleges that under the Acts of Congress and the proclamations of the Presi-

dent of the United States, and under said General Orders Nos. 50, 50-A, 18, 18-A and 18-B, this court has no jurisdiction over the person of this defendant or over the subject matter of this suit and is wholly without jurisdiction to try and determine the matters in controversy herein.

3. Without waiving his objection to the jurisdiction of the court over the subject matter of this action and over the person of the defendant, and answering herein solely because defendant is required by the Court so to do, but continuing to protest and object that the Court is without jurisdiction herein by reason of the facts hereinbefore alleged, the defendant, by way of further answer, denies each and every allegation in the plaintiff's petition contained which is not hereinafter expressly admitted to be true.

4. Defendant admits that at all of the times mentioned in plaintiff's petition he was the duly appointed, qualified and acting Director General of Railroads, and was operating the railroad owned by Union Pacific Railroad Company, and that at various places on Union Pacific Railroad, including Council Bluffs, Iowa, he maintained gantry cranes for transferring both interstate and intrastate shipments from one car to another.

Defendant further admits that the plaintiff was employed by him on September 13th, 1919, as a trucker and that he had been so employed for sometime prior thereto.

Defendant further admits that the plaintiff helped other  
18 employees of this defendant transfer a carload of steel at the gantry crane in Council Bluffs, Iowa, from one car to another, and defendant alleges that said carload of steel was in transit from Black Rock, New York, to Tacoma, Washington, the same having been shipped by the Donner Steel Company from Black Rock, New York, to Tacoma, Washington.

Defendant further admits that the plaintiff and the other employees after having completed the transferring of the carload of steel hereinbefore referred to intended to transfer a carload of telegraph poles at said gantry crane from one car to another, and that said telegraph poles were in transit from St. Paul, Minnesota, to St. Edwards, Nebraska, but defendant alleges that the plaintiff did not assist in transferring said car of telegraph poles and that the same was not transferred until September 14th, 1919; and defendant expressly denies that the plaintiff performed any service for him after he and the other employees had finished transferring the carload of steel hereinbefore referred to.

Defendant further admits that shortly after the plaintiff and the other employees had transferred the carload of steel hereinbefore referred to, the plaintiff injured his eyes but defendant expressly denies that the said injuries arose out of or in the course of plaintiff's employment, and expressly denies that plaintiff was engaged in the prosecution of the defendant's business, or in any way acting within the scope of his employment when he injured his eyes, and defendant alleges that the plaintiff was not at the time he injured his eyes in the prosecution of the defendant's business, and further alleges that the plaintiff was not acting within the scope of his employment when he injured his eyes.

5. For a further defense this defendant alleges that whatever injuries the plaintiff received at the times referred to in his petition were due solely to his own fault and negligence and not to any negligence on the part of this defendant, his agents, servants, or employees.

19-23 6. For a further defense this defendant alleges that the plaintiff assumed the risk of injuring his eyes in the manner in which he did injure them.

Walker D. Hines,  
Director General of Railroads.  
By C. A. Magaw, T. W. Bockes,  
His Attorneys.

STATE OF NEBRASKA,  
*County of Douglas, ss:*

C. A. Magaw, being first duly sworn, on oath deposes and says that he is one of the duly authorized attorneys for the defendant, Walker D. Hines, Director General of Railroads; that he has read the foregoing answer, knows the contents thereof and that the statements therein contained are true as he verily believes.

C. A. Magaw.

Subscribed in my presence and sworn to before me this 17th day of March, A. D. 1920.

Mabel A. Brown,  
Notary Public.

[SEAL.]

[NOTE.—Exhibits A to E inc. to answer omitted in printing. Printed side pages 10 etc.]

24 [File endorsement omitted.]

Afterward, on the 2nd day of April 1920 an Amended Petition was filed herein which said Amended Petition is in the words and figures following, to-wit:

25 In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Amended Petition.**

[Filed Apr. 2, 1920.]

1. Comes now plaintiff and alleges that he is a minor eighteen years of age and brings this action by his father and next friend, Frank J. O'Hara.

2. Plaintiff alleges that Walker D. Hines, Director General of Railroads at all times complained of was operating the railroad lines,



tracks and all equipment of the Union Pacific Railroad Company in Iowa, Nebraska and other states of the Union.

3. That defendant in the operation of said railway was engaged in interstate business and maintained a "gantry" or a very hazardous piece of machinery erected across about three or four parallel tracks so as to run up and down said tracks several hundred feet carrying a crane used to hoist and transfer entire loads or immense loads from bad order cars upon one track to good order cars upon a parallel track.

4. Plaintiff alleges that said machinery known as a "gantry" was maintained for and was used for interstate commerce or to transfer lumber and steel in transit for long hauls from one state to another and through the state of Iowa.

5. That plaintiff was employed as an operator or workman with other men upon said "gantry" which machinery and men were employed in transferring car loads of interstate shipments of freight from bad order cars to cars in good order upon the said railroad lines and the said machinery and men including plaintiff was being used for said purpose and in said interstate work at the time of the injury of which complaint is made.

6. That on the 13th day of September, 1919, while plaintiff was so engaged in the employ of defendant upon said "gantry"

26 and machinery for transfer ~~afore~~ upon interstate traffic he was particularly engaged in repairing one of the cables of said "gantry" which gantry had just immediately before been used and was to be immediately used and was then being used for said interstate traffic and was preparing it to be used in transferring, a carload of telephone or telegraph poles coming from some state east of Iowa and going to some state west of Iowa when plaintiff was injured as later alleged in said act of interstate commerce in that said act was a part of the service of moving carload of poles transferred from state to state and other interstate traffic.

7. Plaintiff alleges that a cable had been stretched and fixed upon said gantry by said employees of defendant as a part of said duties and the end of the cable was incomplete and rough and the wires exposed in such a dangerous way that the foreman directed said employees including plaintiff that said ends be wrapped with cloth and tied down in a manner similar to which other cables were treated therewith.

8. Plaintiff alleges defendant had neglected to provide wires, repairs, tools and machinery proper for the operation of said gantry, and there was no wire upon said machinery or its appurtenances for such use and the foreman directed his subordinates to procure wire to complete said work.

9. Plaintiff alleged one of said employees sought wire in an empty coal car from which a load of material had been received for a similar purpose shortly before and finding a piece of small wire he brought it to said foreman who accepted same and directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition.

10. Plaintiff alleges that said subordinate employees upon said machinery undertook to use said wire for said purposes which wire had been retained and while the foreman and one of defendant's employees aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten  
27 and prepare the small remaining portion of said short wire so that the wire could be used for the said purposes alleged.

11. Plaintiff alleges that there was a small metal bulb or cylinder on the end of said wire and while engaged in preparing said wire the said bulb exploded.

12. Plaintiff alleged that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

13. Plaintiff alleged that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both his eyes will have to be removed.

14. Plaintiff alleges he was in good health up to the time of said injury and had an expectancy of life exceeding 43.87 years and was earning \$3.44 per day with prospects of increasing his earning ability.

15. Plaintiff alleges that by reason of said conduct and resultant injuries he has suffered and sustained damages in the sum of one Hundred thousand (\$100,000.00) dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of One Hundred Thousand (\$100,000.00) Dollars together with the costs of this suit.

John O'Hara, a Minor, By Frank O'Hara,  
Next Friend, By Jno. O. Yeiser, John  
C. Travis, His Attorneys.

STATE OF NEBRASKA,  
*County of Douglas, ss:*

John O. Yeiser of lawful age, being first duly sworn deposes and says that he is acting for the father and next friend of the Plaintiff, John O'Hara & said O'Hara is absent in the State of So. Dakota; and unable to verify the petition; that said John O'Hara is  
28 a minor of the age of eighteen years; that affiant has read the above and foregoing petition, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

John O. Yeiser.

Subscribed in my presence and sworn to before me this 2 day of April, A. D. 1920.

John C. Travis, Notary Public. (Seal.)

[File endorsement omitted.]

Afterwards, on the 12th day of April 1920, an Answer was filed herein which said Answer is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Answer to Amended Petition.**

[Filed Apr. 12, 1920.]

1. Comes now said defendant, Walker D. Hines, Director General of Railroads, and alleges that heretofore and on the 8th day of March, 1920, he appeared specially and objected to the jurisdiction of this Court over the person of the defendant and over the subject matter of this action, and moved the Court to quash the summons herein on the ground that General Orders of the Director General of Railroads, Nos. 50, 50-A, 18, 18-A and 18-B, copies of which are hereto attached, marked Exhibits "A," "B," "C," "D," and "E," respectively, and made a part hereof, provide that all suits against the

Director General of Railroads as authorized by General Order  
29 No. 50-A must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the County or District where the cause of action arose. That thereafter, and on the 13th day of March, 1919, the District Court of Douglas County, Nebraska, overruled said motion.

2. Defendant further alleges that he still objects to the jurisdiction of this Court over the person of the defendant and over the subject matter of this action, and alleges that this action is wrongfully brought in said Court because the said plaintiff was at no time employed by the defendant in this County or District, and was not injured in said County or District, but injured his eyes in Council Bluffs, Pottawattamie County, Iowa, of which said City, County and State he was a citizen and resident at all the times mentioned in plaintiff's petition; and defendant alleges that under the Acts of Congress and the proclamations of the President of the United States, and under said General Orders Nos. 50, 50-A, 18, 18-A and 18-B, this court has no jurisdiction over the person of this defendant or over the subject matter of this suit and is wholly without jurisdiction to try and determine the matters in controversy herein.

3. Without waiving his objection to the jurisdiction of the court over the subject matter of this action and over the person of the defendant, and answering herein solely because defendant is required by the Court so to do, but continuing to protest and object that the Court is without jurisdiction herein by reason of the facts hereinbefore alleged, the defendant by way of further answer, denies each and every allegation in the plaintiff's petition contained which is not hereinafter expressly admitted to be true.

4. Defendant admits that at all of the times mentioned in plaintiff's petition he was the duly appointed, qualified and acting

Director General of Railroads, and was operating the railroad owned by Union Pacific Railroad Company, and that at various places on Union Pacific Railroad, including Council Bluffs, Iowa, he maintained gantry cranes for transferring both interstate and intrastate shipments from one car to another.

Defendant further admits that the plaintiff, John O'Hara, was employed by him on September 13, 1919, as a trucker and that he had been so employed for some time prior thereto.

Defendant further admits that the plaintiff, John O'Hara, helped other employes of this defendant transfer a carload of steel at the gantry crane in Council Bluffs, Iowa, from one car to another, on September 13, 1919, and defendant alleges that said carload of steel was in transit from Black Rock, New York, to Tacoma, Washington, the same having been shipped by the Donner Steel Company from Black Rock, New York, to Tacoma, Washington.

Defendant further admits that the plaintiff and the other employes after having completed the transferring of the carload of steel hereinbefore referred to intended to transfer a carload of telegraph poles at said gantry crane from one car to another, and that said telegraph poles were in transit from St. Paul, Minnesota, to St. Edwards, Nebraska, but defendant alleges that the plaintiff did not assist in transferring said car of telegraph poles and that the same was not transferred until September 14, 1919; and defendant expressly denies that the plaintiff performed any service for him after he and the other employes had finished transferring the carload of steel hereinbefore referred to.

Defendant further admits that one E. W. O'Hara, who defendant alleges was a fellow servant of the said plaintiff John O'Hara, sought and found a piece of small wire in an empty coal car, and that the foreman did not examine said wire and did not see and note that there was a cap attached thereto, but defendant expressly denies that the wire was brought to or called to the attention of the foreman, and denies that he accepted the same.

Defendant further admits that the said E. W. O'Hara cut the cap off of the wire, and defendant alleges that after so doing the said E. W. O'Hara was in the act of throwing said cap away when the said John O'Hara requested the said E. W. O'Hara to give him the said cap, and defendant alleges that thereupon the said E. W. O'Hara gave the said cap that had been cut off of said wire to the said John O'Hara, and that a short time thereafter he exploded the same and injured his eyes, but defendant expressly denies that the said injuries arose out of or in the course or scope of the employment of the said John O'Hara, and denies that he was engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received said cap or when he exploded it and injured his eyes.

Defendant further alleges that the said E. W. O'Hara was not acting within the scope or course of his employment when he gave the said cap to the said John O'Hara, and that he did not give the cap to the said John O'Hara for his use in connection with the prosecu-

tion of the defendant's business in any way, but gave it to the said John O'Hara upon his request, as aforesaid, for the purpose of satisfying the curiosity and personal ends of the said John O'Hara.

Defendant further alleges that neither he nor any of his agents, servants or employes had any knowledge of the existence of the said cap until its discovery in the empty coal car by the said E. W. O'Hara, and that neither this defendant nor any of his agents, servants or employes have any knowledge as to where the said cap came from or as to how or when the same got into said car.

5. For a further defense this defendant alleges that whatever injuries the plaintiff received at the times referred to in his petition were due solely to his own fault and negligence, and not to any negligence on the part of this defendant, his agents, servants, or employes.

6. For a further defense this defendant alleges that when the plaintiff received and accepted said cap from the said E. W. O'Hara, the plaintiff assumed the risk of exploding it, and injuring his eyes in the manner in which he did injure them.

7. Defendant further alleges that the Iowa Workmen's Compensation Law, being Title 12, Chapter 8-A, Supplement to the Code 1913, as amended by the 37th and 38th General Assemblies was in full force and effect at the time mentioned in plaintiff's petition, and that said Compensation Law is not the same as the Nebraska Employers' Liability Act, and does not contain the following provision: "Railroad Companies engaged in interstate or foreign commerce are declared subject to the powers of Congress and not within the provisions of this Article," which said provisions are contained in the Nebraska Workmen's Compensation Law.

Defendant further alleges that the said Iowa Workmen's Compensation Law differs from the Nebraska Workmen's Compensation Law in many other material provisions and respects; and that by the terms of said Iowa Compensation Law, the common law as to master and servant is repealed, and plaintiff has no rights against this defendant, unless the same are granted by said Iowa Compensation Law.

Walker D. Hines, Director General of Railroads,  
By C. A. Magaw, T. W. Bockes,  
Douglas Smith, His Attorneys.

STATE OF NEBRASKA,  
County of Douglas, ss:

C. A. Magaw, being first duly sworn, on oath deposes and says that he is one of the duly authorized attorneys for the defendant, Walker D. Hines, Director General of Railroads; that he has read the foregoing answer, knows the contents thereof, and that the statements therein contained are true as he verily believes.

C. A. Magaw.

Subscribed in my presence and sworn to before me this 12th day of April, 1920.

Mabel A. Brown, Notary Public. (Seal.)

33-37 [NOTE.—Exhibits A to E, inc., to Answer to Amended petition omitted in printing. Printed side pages 10, etc.]

38 [File endorsement omitted.]

Afterward, on the 16th day of July 1920 as of May 25, 1920 per Order of Court, a Reply was filed herein which said Reply is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Reply.**

[Filed July 16, 1920, Nunc Pro Tunc as of May 25, 1920.]

Comes now John O'Hara by his next friend Frank J. O'Hara, and for reply to defendant's answer to the amended petition, denies each and every allegation therein contained which is not an admission of the allegations of plaintiff's petition or which is not hereinafter specifically admitted.

39 2. Plaintiff denies the allegation, if such it is, in the fourth paragraph of said answer that the gantry maintained at Council Bluffs, Iowa, was used for intrastate shipments.

3. Plaintiff denies that he was employed as a trucker at the time of his injury but in that respect alleges that he had been transferred permanently to a position upon said gantry.

4. Plaintiff admits that part of the allegation in the fourth paragraph wherein defendant alleges that plaintiff and his fellow servants transferred a carload of steel in transit from Black Rock, New York, to Tacoma, Washington, having been shipped by the Donner Steel Company, Black Rock, New York, to Tacoma, Washington, and alleges that the said act was but one of a series of acts in transferring a string of cars all of which contained shipments of material from one state to another and into the State of Iowa, through Iowa, and on into other states.

5. Plaintiff admits the allegation in the fourth paragraph that plaintiff and other employees after having completed the transferring of the said carload of steel intended to transfer a carload of telegraph poles at said gantry crane from one car to another and that said carload of telegraph poles were in transit from St. Paul, Minnesota, to St. Edwards, Nebraska, and denies the allegation and inference that plaintiff had performed no service for defendant after he and the other employes had finished transferring the carload of steel hereinbefore referred to, but in this respect alleges that

said carload of telegraph poles was the next car in the series of cars all bearing interstate shipments and was ready to be handled and there was not more than sufficient time for preparation and that because of the weight and manner of loading of said telegraph poles the foreman over this plaintiff and his fellow servants decided that a cable sling had to be stretched, arranged and adjusted in place of a rope sling upon said gantry as a part of said act immediately connected therewith and a part of the essential preparation and was being so fixed as speedily as possible and as a part of said transfer at the time of the injury complained of.

6. Plaintiff denies that he assumed the risk and denies that he knew of any risk in using the said wire, alleging that said explosive condition was latent to plaintiff who did not know of any such danger and an ordinarily prudent person of his age would not know of its danger and was patent to defendant and his agents and servants who were working with plaintiff and knew and should have known of said danger and who were older men and higher in authority while plaintiff was young and inexperienced and that the foreman over the plaintiff and his fellow servants were charged with the knowledge that defendant was charged with in the selection of safe materials and appliances with which to work.

7. Plaintiff alleges with respect to the first, second and third paragraphs of said answer to amended petition the objections therein contained have been raised by special appearance and overruled by the Court and are foreclosed for further consideration in the trial of this cause at this time.

Wherefore, plaintiff having fully replied to the said answer to amended petition prays that the prayer of his amended petition be granted.

John O'Hara, By His Next Friend, Frank  
J. O'Hara, By J. O. Yeiser and J. C.  
Travis, His Attys.

STATE OF NEBRASKA,  
*County of Douglas, ss:*

Frank J. O'Hara, being first duly sworn, says on oath that he is the father and the next friend of John O'Hara plaintiff in the above entitled action; that said John O'Hara is a minor; that said Frank J. O'Hara has read the above and foregoing reply, knows the contents thereof and that the matters and things therein set forth are true as he verily believes.

Frank J. O'Hara.

Subscribed in my presence and sworn to before me this 26th day of May, A. D. 1920.

John C. Travis, Notary Public. (Seal.)

[File endorsement omitted.]

Afterward, at the May 1922 Term of Court and on the 11th day of May 1922, a Mandate was filed and entered of record herein as appears on page 543 Journal 196 as follows, to-wit:



In District Court of Douglas County.

[Title omitted.]

**Mandate.**

[Filed May 11, 1922.]

A Mandate having been received from the Supreme Court of Nebraska, in the above entitled cause, it is hereby ordered that due execution thereof be had. Said Mandate reads and is as follows, to-wit:

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, January Term, 1922.

To the District Court of the Fourth Judicial District, Sitting in and for the County of Douglas, Greeting:

Whereas, in a late action before you, wherein John O'Hara, a minor, by his next friend Frank J. O'Hara, was Plaintiff and Walker D. Hines, Director General of Railroads was Defendant, the said Defendant recovered a judgment against said Plaintiff upon a transcript of which record and proceedings in your said Court, the said Plaintiff prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the January Term, A. D. 1922, a certified copy of the opinion being hereto attached and made a part hereof, it was considered by said Court that the judgment rendered by you in favor of said Defendant and against said Plaintiff be reversed at the costs of said Defendant taxed at \$137.00 and cause remanded for further proceedings.

Now, therefore, you are commanded, without delay, to proceed according to law.

Witness the Hon. Andrew M. Morrissey Chief Justice, and the Seal of said Court, at Lincoln, this 9th day of May, 1922.

H. C. Lindsay, Clerk, By P. F. Greene,  
Deputy. (Seal.)

After, at the May 1922 Term of Court and on the 31st day of May 1922 an Order was entered herein as appears on page 649 Journal 192 as follows, to-wit:



In District Court of Douglas County.

[Title omitted.]

**Order Substituting Plaintiff.**

[Filed May 31, 1922.]

This cause coming on for hearing upon the motion of John O'Hara for substitution of plaintiff, and it appearing that said John O'Hara has attained his majority since the commencement of this action and now desires to prosecute the same in his own right, the Court, upon full consideration thereof, and defendant consenting thereto, sustains said motion; and it is, therefore by the Court ordered that John O'Hara be, and hereby is substituted for and in the place and stead of John O'Hara, a minor by his next  
42 friend Frank O'Hara, as plaintiff in this cause.

This cause came on further for hearing upon the oral motion in open court for substitution of defendant, upon consideration whereof, being fully advised in the premises and over the objections of defendant, the court sustains said motion; and it is therefore by the Court ordered that James C. Davis, Agent of the President under section 206 of the Transportation Act of 1920, be, and hereby is, substituted for and in the place and stead of Walker D. Hines, Director General of Railroads, as defendant in this cause.

Afterward, at the May 1922 Term of Court and on the 31st day of May 1922, an Order was entered herein as appears on page 649 Journal 192 as follows, to-wit:

In District Court of Douglas County.

[Title omitted.]

**Trial Order.**

Now, on this day, this cause came on for trial, the parties thereto appearing by their respective counsel. Thereupon came the following named persons as jurors, to-wit:

Wm. C. Ray,	Henry F. C. Wulff, Jr.,	William A. Redpath,
Julius Fisher,	Owen P. Doty,	Jim E. Beasley,
Morris Alexander,	Frank M. Walker,	Earl F. Campbell,
Charles P. Hood,	Warren J. Savage,	John W. Allen,

who were duly impaneled and sworn according to law and the trial proceeded.

The said jury having heard the opening statement of the  
43 Case by respective counsel, and the evidence adduced in part, thereupon, upon full consideration of the motion therefor,

it is by the Court ordered that the Exhibits be, removed from the former Bill of Exceptions filed in this cause, and thereupon, the further hearing of this cause was continued until Thursday morning, June 1st, 1922, at nine o'clock.

Afterward, at the May 1922 Term of Court and on the 1st day of June 1922, an Order was entered herein as appears on page 651 Journal 192 as follows, to-wit:

In District Court of Douglas County.

JOHN O'HARA, a Minor, by His Next Friend, FRANK O'HARA, Plaintiff; JOHN O'HARA, Substituted Plaintiff,

vs.

WALKER D. HINES, Director General of Railroads, Defendant; JAMES C. DAVIS, Agent of the President under Section 206 of the Transportation Act of 1920, Substituted Defendant.

### **Trial Order.**

Now, on this day, again came the parties hereto by their respective counsel; also came the jury, heretofore impaneled and sworn; and the trial proceeded.

The said jury having heard further evidence adduced in part, thereupon further hearing of this cause was continued to Friday morning, June 2nd, 1922, at nine o'clock.

Afterward, on the 2nd day of June 1922, Instructions by the Court were filed herein which said Instructions are in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

44

[Title omitted.]

### **Instructions by the Court.**

[Filed June 2, 1922.]

GENTLEMEN OF THE JURY:

You are instructed, as follows:

#### **I.**

John O'Hara, the plaintiff, brings this action against the Director General of Railroads, the defendant, to recover damages he alleges he sustained by an injury to his eyes. The plaintiff was employed by the defendant in the operation of a gantry at Co. Bluffs, Iowa, which was used to transfer loads from bad order to good order cars. He alleges that he was transferring carloads of interstate ship-

ments and on September 13, 1919, while he was engaged in assisting to prepare the gantry to transfer a carload of poles coming from some state east of Iowa and going to some state west of Iowa, and that in the course of his duties *she* was assisting in wrapping the ends of a cable with a cloth to prevent injuries to the hands of the employes. Plaintiff further alleges that the defendant neglected to provide wire and tools proper to operate or repair said machinery, and that the foreman in charges told his subordinates to provide wire for such work; that one of defendant's agents found wire in an empty coal car and brought it to the foreman who directed its use by his subordinates, without carefully examining the same and that he failed to see and know its dangerous condition; that there was a metal cylinder on said wire containing an explosive, not known to plaintiff and which wire and cylinder was negligently given plaintiff by defendant's employe; that plaintiff undertook to straighten said wire to be used in repairing said gantry, and while so engaged the cylinder was exploded, putting out the sight of both eyes; that he was previously in good health and had a life expectancy of about 43 years earning \$3.44 a day, and as a result of the injuries he is damaged in the sum of \$100,000.

Given: L. B. Day, Judge.

2.

The defendant in his answer alleges that the Union Pacific Railroad at the time in question was operated by the Director General. Defendant further admits that John O'Hara was employed by him on September 13, 1919, and that he assisted other employes of defendant to transfer a carload of steel at the gantry in Council Bluffs, Iowa on said date; and that they intended to transfer a carload of poles from St. Paul, Minnesota to St. Edwards, Nebraska, but that plaintiff did not assist in transferring it, and performed no service for defendant after the transfer of the steel; defendant admits that E. W. O'Hara sought and found a piece of small wire in an empty coal car, and that the foreman did not examine said wire and did not see there was a cap attached thereto, and denies that it was brought to him or that he accepted it.

The defendant alleges that E. W. O'Hara cut the cap off of the wire and gave it to plaintiff, and that a short time thereafter he exploded the same and injured his eyes, but the defendant denies that the injuries arose out of or in the course or scope of the employment of the plaintiff when he received said cap and exploded it injuring his eyes. The defendant further alleges said E. W. O'Hara was not acting within the scope of his employment when he gave said cap to the plaintiff, that said cap was not given to plaintiff in connection with the prosecution of defendant's business, but was given plaintiff upon his request for the purpose of satisfying the curiosity and personal ends of plaintiff; that neither the defendant nor any of his agents or employes had any knowledge of the existence of said cap until its discovery in the empty car, nor

did they know where the said cap came from or how or when it  
got into said car; that any injury plaintiff received was due  
46 solely to his own fault and negligence and not to the negligence of the defendant or his employes. That when the plaintiff received and accepted the cap from said E. W. O'Hara he assumed the risk of ex-loding it and injuring his eyes. The defendant further denies all the allegations of plaintiff's petition.

Given: L. B. Day, Judge.

3.

Plaintiff filed a reply denying the allegations of defendant's answer which are not specific admissions of plaintiff's petition; and denies the gantry was being used for intrastate shipments, and denies plaintiff was employed anywhere except on said gantry; and further says he was working on a series of interstate shipments and intended to transfer a carload of poles in transit from Minnesota to Nebraska, which car was ready to transfer and a cable sling was in preparation to handle said load; and he denies he assumed the risk, and denies he knew of any risk in using said wire. That said condition was latent to plaintiff who did not know of such danger, but that it was apparent to defendant and his agents and servants with whom he was working, and that they knew or should have known of the danger, were older men, while plaintiff was young and inexperienced, and that the foreman was charged with the duty in selecting safe materials with which to work.

Given: L. B. Day, Judge.

4.

The burden of proof is upon the plaintiff to establish by a preponderance of the evidence the following material allegations:

1. That the defendant was negligent in some particular as alleged in the plaintiff's petition.

2. That the said negligence, if any you find, was the direct, immediate and proximate cause of the injury to the plaintiff.

3. The amount of damage which the plaintiff has sustained, if any.

47 If you find that the plaintiff has failed to establish any one or all of the above propositions by a preponderance of the evidence your verdict will be for the defendant; but if you find that plaintiff has so established these propositions your verdict will be for plaintiff.

Given: L. B. Day, Judge.

5.

The plaintiff alleges in this case that at the time of his injuries that he and the defendant were engaged in interstate commerce within the meaning of the federal employers' liability act, and if

you find from a preponderance of the evidence that the plaintiff in the course of his employment and defendant were engaged in handling interstate shipments at said time then this case is governed by the provisions of that act.

Section 1 of the act insofar as it is applicable here provides, as follows:

"Every common carrier by railroad while engaged in commerce between any of the several states and territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of the officers agents or employes of such carrier."

It is further provided by Section 3 of said act insofar as it is applicable here, as follows:

"In all actions hereafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to said employe."

48      You are therefore instructed that if the injuries received by plaintiff were due in whole or in part to the negligence of defendant's employes as set out in plaintiff's petition the defendant would be liable therefor, notwithstanding that the plaintiff may also have been guilty of negligence, and such negligence of the plaintiff, if any, would only go in diminution of damages as hereinafter set forth.

Given: L. B. Day, Judge.

6.

Contributory negligence is the negligence act of a plaintiff, which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury.

If you find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides, as heretofore stated, that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; so, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to the recovery, but goes by way of diminution of damages, and where the causal negligence is partly attributable to the plaintiff and partly to the defendant the plaintiff cannot recover full damages, but only a proportional amount bearing the same relation to the full amount

as the negligence attributable to the carrier bears to the entire negligence attributable to both.

Given: L. B. Day, Judge.

7.

To better understand these instructions the court defines certain words and terms used herein:

By negligence is meant the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.

49 By contributory negligence is meant any negligence of plaintiff directly contributing to the accident.

By ordinary care is meant that amount or degree of care which common prudence and a proper regard for one's own safety of the safety of others would require under the circumstances shown in the evidence.

By proximate cause is meant the primary or moving fault, the dominant cause which produces the injury and which in and of itself, or by the natural sequence of events of which it was the prime cause was sufficient to and did bring about the injury complained of.

Given: L. B. Day, Judge.

8.

Certain witnesses have been called who testified as expert witnesses, and gave their opinions. You are not bound to take the opinions of experts as binding upon you, but only to aid you in coming to a proper conclusion—their testimony being received as that of persons who are learned by reason of extra investigation and study along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case.

Given: L. B. Day, Judge.

9.

If you find for the plaintiff you will assess the damages you find he has sustained as a result of his injury. You will allow him such sum as will compensate him for his injuries, not exceeding \$100,000, which is the amount plaintiff sets out in his petition as his damage. The elements entering into plaintiff's damages are as follows:

1. The value of his time during the period that he has been disabled by the injuries.
  - 50 2. If the injuries have impaired plaintiff's power to earn money in the future such sum as will compensate him for such loss.
  3. Such reasonable sum as you shall award him on account of any pain, anguish and humiliation he has suffered by reason of his injuries.
  4. Such sum as the jury may deem proper for the inconvenience of his going through life without his eyes, and from all the circumstances as shown by the evidence fix the damages resulting from the injuries to plaintiff's person. You should not allow any sympathy or any prejudice for or against either of the parties to influence you in arriving at a verdict. The law demands of you a just verdict as between man and man, not influenced by sympathy or any outside influence, and based solely upon the evidence given upon the trial, and the law as explained in these instructions.
- If you find for the defendant you will simply find generally for the defendant.

Given: L. B. Day, Judge.

10.

By a preponderance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence, which taken on the whole produces the stronger impression upon the minds of the jury, and convinces you of its truth when weighed against the evidence in opposition thereto.

Given: L. B. Day, Judge.

11.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony, and in determining the weight which the evidence of the witnesses is entitled to receive you should consider their interest in the result of the suit, if any, their conduct and demeanor while testifying, their relationship to the parties, if any such is shown, their apparent fairness or bias, if any such appears, their opportunity for seeing and knowing the  
51 things about which they testified, the reasonableness or unreasonableness of the statements made by them, and all other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses.

Given: L. B. Day, Judge.

12.

On retiring for deliberation you will elect one of your number foreman, who alone will sign your verdict if unanimous, when one

is agreed upon, and return it with these instructions into court. The law provides that after you have deliberated for a period of six hours, five-sixths of the jury, or ten members thereof may, if they concur, return it with the same force and effect as though agreed to by all members of the jury. In case such a verdict becomes necessary each member of the jury who concurs must sign it.

If you cannot agree by 10 o'clock tonight you may separate, but reconvene tomorrow at 9 A. M. to resume your deliberations. In the meantime you should not talk with any one about the case, nor permit anyone to talk to you about it, nor discuss it among yourselves. If you agree on a verdict when court is not in session sign it as above instructed, and have your foreman enclose it in a sealed envelope and keep it in his custody. Then you can separate and all be in court at the opening of its next session to return the verdict agreed upon.

Given: L. B. Day, Judge.

By the Court, L. B. Day, Judge.

[File endorsement omitted.]

Afterward, at the May 1922 Term of Court and on the 2nd day of June 1922, an Order was entered herein as appears on page 653 Journal 192 as follows, to-wit:

52

[Title omitted.]

### **Trial Order.**

Now, on this day, again came the parties hereto by their respective counsel; also came the jury, heretofore impaneled and sworn; and the trial proceeded.

The said jury, having heard the remaining evidence adduced, the arguments of counsel, and the instructions of the court, retired for deliberation in the charge of a sworn officer of this court.

Afterward, on the 3rd day of June 1922, Supplemental Instructions by the Court were filed herein which said Supplemental Instructions are in the words and figures following, to wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

### **Supplemental Instructions.**

[Filed June 3, 1922.]

1.

GENTLEMEN OF THE JURY: In addition to the instructions heretofore given the following instructions are now given to you which



you will consider, together with the former instructions: These instructions were omitted from the original instructions by an oversight and must not be construed by the jury in any different light

than if they had been given as a part of the original instructions.

One of the elements of damage which the plaintiff seeks to recover in this action is the amount he claims his earning capacity has been diminished as a result of the accident in question. If you find for the plaintiff you should determine from the evidence the probable duration of expectancy of plaintiff's life and the amount of money which the plaintiff would have been able to earn during the remainder of his life had he not sustained the injuries of which he complains. From this amount you should deduct the probable amount which the plaintiff, notwithstanding his injuries, will be able to earn during the probable remainder of his life. The difference, if any between these amounts will represent the total amount by which the plaintiff's capacity has been diminished, but you cannot allow him on this account such total amount, but only the present worth thereof. In computing the present worth thereof, you should divide such total amount by one dollar plus the interest thereon at five and one half per cent per annum for the number of years which you find the plaintiff will probably live from the date of his accident.

Given: L. B. Day, Judge.

## 2.

In the preceding instruction you were told that the method of determining the present worth of a future debt was to divide the sum so found by the amount of one dollar for the given rate and time.

An illustration: If it was desired to find what the present worth of say, \$100 due in one year on the basis of money being worth, say five and one-half per cent per annum, you would divide one hundred dollars by \$1.05½ that being the interest on \$1.00 for one year plus the dollar. The result of such dividend would be the present worth of \$100 due in one year. If \$100 is due in two years on the basis of 5½% the present worth would be found by dividing \$100 by \$1.11, the \$1.11 being the interest for two years plus the one dollar. For the period of three or subsequent years, the present worth may be found by applying the same rule. The aggregate of these sums would be the present worth.

Given: L. B. Day, Judge.

## 3.

So much of the Carlisle Tables of Life Expectancy has been received in evidence as the expectancy of a man of plaintiff's age shows. In an action for damage for personal injuries, where such injuries are shown to be permanent the Carlisle Tables of expectancy of life is competent and admissible in evidence as bearing upon and tend-

ing to prove the expectancy of life, but not conclusive of the question, and is to be received and considered by the jury as any other evidence and subject to the same rules as to its weight and sufficiency as other testimony; and its statements as to expected duration of life may be varies, strengthened, weakened or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party. In determining the expectancy of life of the deceased you should consider his situation in life, his health and habits, and the probability or the reasonable expectancy of his life at the time of the injury.

Given: L. B. Day, Judge.

4.

If you find from all the evidence in the case, and under these instructions, that the injury in question was proximately caused solely and exclusively by the negligence of the plaintiff, said negligence will bar a recovery and in that case your verdict will be for the defendant.

Given: L. B. Day, Judge.

5.

You will now retire in charge of the bailiff for further deliberation taking into consideration these additional instructions.

Given: L. B. Day, Judge.

By the Court.

L. B. Day, Judge.

55 [File endorsement omitted.]

Afterward, on the 3rd day of June, 1922, Instruction Requested by Defendant and Refused was filed herein which said Instruction is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Instruction Requested by Defendant.**

[Filed June 3, 1922.]

Comes now said defendant and requests the court to give the following instruction to the jury:

I.

You are instructed to return a verdict for the defendant.

Refused: L. B. Day, Judge.

172-108. Deft. Inst. Refused. Filed in District Court Douglas County, Nebraska Jun. 3, 1922. Robert Smith, Clerk.

**Trial Orders.**

Afterward, at the May 1922 Term of Court and on the 3rd day of June 1922, an Order was entered herein as appears on page 654 Journal 192 as follows, to-wit:

[Title omitted.]

**Trial Order.**

Now, on this day, again came the parties hereto by their  
56 counsel, also came the jury heretofore impaneled and sworn,  
and having been called into court at 9:10 A. M., on the Court's  
motion and in the presence of counsel for both parties are given  
supplemental instructions and thereupon said jury retired for fur-  
there deliberation.

Afterward, at the May 1922 Term of Court and on the 5th day  
of June 1922, a Verdict was rendered and Judgment was entered  
herein as appears on page 656 Journal 192 as follows, to-wit:

In District Court of Douglas County.

[Title omitted.]

**Verdict and Judgment.**

[Filed June 5, 1922.]

Now, on this day, again came the parties hereto by their respective  
counsel; also came the jury, heretofore impaneled and sworn, and  
return into open court with their verdict having deliberated thereon  
from 9:10 o'clock A. M., of June 3rd 1922, to 7:15 o'clock P. M.,  
of June 5th, 1922, which said verdict is in the words and figures  
following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Verdict.**

We, the jury duly impaneled and sworn in the above entitled cause,  
do find for the said plaintiff and assess the amount of his recovery  
in the sum of \$46,840.11.

57

Frank M. Walker, Foreman. W. J. Savage.  
O. P. Doty. John W. Allen. Earl F.  
Campbell. Morris Alexander. Wm. A.  
Redpath. Chas. P. Hood. J. E. Beas-  
ley. H. Wulff.

Whereupon said jury was discharged from further consideration of  
this cause.

**Judgment.**

It is therefore considered, ordered, and adjudged by the Court that the plaintiff have and recover of and from James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, substituted defendant herein, the sum of Forty-six Thousand Eight Hundred and Forty and 11/100 Dollars (\$46,840.11), his damages as assessed by the verdict of the jury herein, together with interest thereon at the rate of 7% per annum from this date, and his costs herein expended, taxed at \$—.

Afterward, on the 7th day of June 1922, a Motion for New Trial was filed herein which said Motion is in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

[Title omitted.]

**Motion for New Trial.**

[Filed June 7, 1922.]

James C. Davis, Director General of Railroads and Agent under the Transportation Act, 1920, as defendant herein, still objecting that the court is without jurisdiction herein under the provisions of General Orders Numbers 50-A, 18-A and 18-B of the Director General of Railroads, for the reason that the alleged cause of action herein arose in Pottawattamie County, of which county and state the plaintiff was a resident at the time of the accrual of said cause of action, and without waiving said objection to the jurisdiction of the court, moves the court to vacate and set aside the verdict rendered herein and the judgment entered thereon on the 5th day of June, 1922, for the following causes, materially affecting the substantial rights of the defendant:

58 1. The court erred in permitting the plaintiff to substitute James C. Davis, Director General of Railroad- and Agent under the Transportation Act of 1920 as defendant herein.

2. The court erred in overruling the objection of the defendant to such substitution.

3. The court erred in overruling the objection made by the defendant to the impaneling of a jury herein upon the ground that the court was without jurisdiction of said cause under the provisions of General Orders Nos. 50-A, 18-A and 18-B of the Director General of Railroads.

4. The court erred in overruling the objection made by the defendant at the conclusion of the plaintiff's evidence against the defendant being required to produce evidence, which objection was made upon the ground that the court was without jurisdiction of said cause under General Orders Nos. 50-A, 18-A and 18-B of the

Director General of Railroads for the reason that the plaintiff's evidence showed that the cause of action in question arose in Pottawattamie County, Iowa, on September 13, 1919, and that the plaintiff was at said time a resident of Pottawattamie County, Iowa.

5. The court erred in overruling defendant's objection at the close of the plaintiff's evidence against being required to produce evidence, which objection was made upon the ground that the evidence produced by the plaintiff was not sufficient to sustain a verdict or judgment against the defendant under the issues joined in said action.

6. The court erred in overruling the objection of the defendant to the submission of said cause to the jury, which objection was made at the close of all the evidence upon the ground that the court was without jurisdiction of said cause.

59 7. The court erred in overruling defendant's objection to the submission of said cause to the jury, which objection was made at the close of all the evidence upon the ground that the evidence produced was not sufficient to sustain a verdict or judgment against the defendant under the issues joined in said action.

8. The court erred in giving to the jury instruction No. 1.

9. The court erred in giving to the jury instruction No. 2.

10. The court erred in giving to the jury instruction No. 3.

11. The court erred in giving to the jury instruction No. 4.

12. The court erred in giving to the jury instruction No. 5.

13. The court erred in giving to the jury instruction No. 6.

14. The court erred in giving to the jury instruction No. 7.

15. The court erred in giving to the jury instruction No. 8.

16. The court erred in giving to the jury instruction No. 9.

17. The court erred in giving to the jury instruction No. 10.

18. The court erred in giving to the jury instruction No. 11.

19. The court erred in giving to the jury instruction No. 12.

20. The court erred in giving to the jury supplemental instruction No. 1 given by the court upon its own motion on June 3, 1922, after the jury had retired and while the jury was deliberating upon its verdict.

21. The court erred in giving to the jury supplemental instruction No. 2 given by the court upon its own motion on June 3, 1922, after the jury had retired and while the jury was deliberating upon its verdict.

22. The court erred in giving to the jury supplemental instruction No. 3 given by the court upon its own motion on June 3, 1922, after the jury had retired and while the jury was deliberating upon its verdict.

23. The court erred in giving to the jury supplemental instruction No. 4 given by the court upon its own motion on June 3, 1922, after the jury had retired and while the jury was deliberating upon its verdict.

60 24. The court erred in giving to the jury supplemental instruction No. 5 given by the court upon its own motion on June 3, 1922, after the jury had retired and while the jury was deliberating upon its verdict.

25. Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial.

26. Misconduct of the jury.
27. Excessive damages, appearing to have been given under the influence of passion or prejudice.
28. The verdict is not sustained by sufficient evidence.
29. The verdict is contrary to law.
30. Errors of law occurring at the trial and excepted to by the defendant.
31. The court erred in modifying instruction No. 4 given by the court, after the same had been read to the jury and in the absence of counsel, by striking therefrom the words "unless you further find that plaintiff assumed the risk of his injuries as hereinafter explained in these instructions."
32. The court erred in failing to instruct the jury with reference to the plaintiff's assumption of the risk of injury.

James C. Davis, Director General of Railroads and Agent under the Transportation Act, 1920, Defendant, By C. A. Magaw, Thos. W. Bockes, Douglas F. Smith, His Attorneys.

[File endorsement omitted.]

61       Afterward, at the May 1922 Term of Court and on the 1st day of July 1922 an Order was entered herein as appears on page 676 Journal 192 as follows, to-wit:

In District Court of Douglas County.

[Title omitted.]

**Order Overruling Motion for New Trial.**

[Filed July 1, 1922.]

Now, on this day, this cause came on for hearing upon the motion of the substituted defendant for an order of the court setting aside the verdict of the jury heretofore entered, vacating the judgment entered thereon, and for a new trial herein, upon consideration whereof, being fully advised in the premises, it is by the Court Ordered that said motion be, and the same hereby is, overruled; and said defendant is allowed exceptions thereto with forty (40) days from the rising of the Court in which to prepare and serve a bill of exceptions herein.

**Clerk's Certificate.**

THE STATE OF NEBRASKA,  
County of Douglas, ss:

I, Robert Smith, Clerk of the District Court, in and for Douglas County, Nebraska, do hereby certify that the foregoing is a full and true Transcript of the proceedings and record in the District Court,

Douglas County, Nebraska, containing the Petition, Summons, Sheriff's Return to said Summons, Special Appearance, Order overruling said Special Appearance, Answer of Defendant Walker

62 D. Hines, Amended Petition, Answer of Defendant Walker  
D. Hines, to Amended Petition, Reply, Mandate, Order Substituting Plaintiff and Defendant, Trial Order, Trial Order, Instructions by the Court, Trial Order, Supplemental Instructions by the Court, Instruction requested by Defendant and Refused, Trial Order, *Trial Order*, Verdict and Judgment, Motion for New Trial and Order Overruling said Motion in the case of John O'Hara against James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920 appearing of record in said Court.

I do further certify that the bill of exceptions hereto attached and made a part of this Transcript was attached by me and is the original bill of exceptions filed in the office of the Clerk of said Court, in the above entitled action.

In witness whereof, I have set my hand and affixed the seal of said Court at Omaha, this 26 day of August A. D. 1922.

Robert Smith, Clerk, By Cornelius Farrell,  
Deputy. (Seal.)

[File endorsement omitted.]

63 And on the same day, to wit, 1st day of September, 1922, there was filed in the office of the Clerk of said Supreme Court, a certain Bill of Exceptions in the words and figures following:

64 In the District Court of Douglas County, Nebraska.

[Title omitted.]

### **BILL OF EXCEPTIONS.**

[Filed Aug. 26, 1922.]

Before the Hon. L. B. Day, Judge, and a Jury.

Wm. S. Heller, Official Reporter.

[File endorsement omitted.]

Clerk's Fees, \$75¢, paid by U. P. R. Ry. Co.

65 Received of Mr. Charles A. Magaw, for examination and amendment a draft of the bill of exceptions in the case of John O'Hara, plaintiff vs. James C. Davis Director General & Agent of Railroads, Defendant, tried in the District Court of Douglas County, Nebraska, at the regular May, 1922 Term.

Dated, August 16, 1922.

Jno. O. Yeiser, Jno. C. Travis, Attorneys for  
Plaintiff.

Stipulation and Order Settling Bill of Exceptions. 37

We herewith return draft of bill of exceptions in the above entitled case, submitted to us on the 16 day of August, 1922, and propose the following amendments: None—

Dated, August 25, 1922.

Jno. O. Yeiser & J. C. Travis, Attorneys for  
Plaintiff.

66

In District Court of Douglas County.

**Stipulation and Order Settling Bill of Exceptions.**

It is hereby stipulated by and between the parties hereto that the following is a full and complete transcript of all the evidence, oral and documentary introduced on the trial of the above entitled cause, together with all the objections of counsel thereto, rulings of the court on said objections and exceptions taken thereto.

Dated, Aug. 25, 1922.

Jno. O. Yeiser & J. C. Travis, Attorneys for  
Plaintiff.

Dated, Aug. 16, 1922.

C. A. Magaw, T. W. Bockes, D. F. Smith,  
Attorneys for Defendant.

I hereby certify that the within record now contains all the evidence offered or given upon the trial of the within cause, by either party, together with all objections of counsel thereto, rulings of the court on said objections, and exceptions taken thereto, and on application of the defendant herein this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

By the Court,

L. B. Day, Judge.

Dated, Aug. 26, 1922.

67

In District Court of Douglas County.

**Clerk's Certificate to Bill.**

STATE OF NEBRASKA,  
Douglas County, ss:

I, Robert Smith, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for said County, do hereby certify that this is the original Bill of Exceptions filed in my office in the cause in said Court, wherein John O'Hara is Plaintiff and James C. Davis Defendant.

Witness my signature and official seal this 26th day of August, A. D. 1922.

Robert Smith, Clerk, By Wilfred M. Pardee,  
Deputy.

[SEAL.]



68-70

In District Court of Douglas County.

**Reporter's Certificate.**

Omaha, Nebraska, August 15, 1922.

I hereby certify that the following is a full and complete transcript of the original shorthand notes taken by me of the proceedings had during the trial of the within entitled cause.

Wm. S. Heller, Official Reporter, Fourth  
Judicial District, Douglas County, Ne-  
braska.

71 In the District Court of Douglas County, Nebraska.

[Title omitted.]

Be it remembered, that at the regular May Term, A. D. 1922, of the District Court, held at Omaha, Nebraska, within and for Douglas County, Nebraska, to-wit, on the 31st day of May, 1922, before the Honorable L. B. Day, Judge, the above entitled case was called for trial, and a jury having been first duly impaneled and sworn, the following proceedings were had, viz:—

Appearances: Messrs. J. C. Travis and John O. Yeiser, Attorneys for Plaintiff; Messrs. Charles A. Magaw and T. W. Bockes, Attorneys for Defendant.

72 1. Mr. Magaw: The defendant objects to the impaneling of a jury herein, and to the trial of this case for the reason, and upon the ground that the plaintiff was not a resident of Douglas County, Nebraska, when he suffered the injuries upon which he bases this action, and because his alleged cause of action did not arise in Douglas County, Nebraska, in which county this suit is brought.

2. In support of this objection the defendant now offers to prove that the plaintiff received the injuries for which he seeks to recover damages in this action in Council Bluffs, Pottawattamie County, Iowa, and that the plaintiff was at the time he suffered said injuries a citizen and resident of that county and state, and that this action was not brought in the county or district where the plaintiff resided at the time of the accrual of his alleged cause of action or in the county or district where the alleged cause of action arose, as required by General Orders No. 50-A, No. 18-A and No. 18-B of the Director General of Railroads, and the defendant contends that by reason of the foregoing this court is without jurisdiction to proceed in this case.

3. Mr. Magaw: Mr. Yeiser, you admit that the plaintiff suffered the injuries upon which he bases this case in Council Bluffs, Iowa, do you not?

4. Mr. Yeiser: I shall make no admission with respect to this objection for the reason that the matter has been presented to the

Supreme Court of this state and the supreme court has refused to sustain the objections.

5. Mr. Magaw: I want to call the plaintiff to prove this fact.

6. Mr. Yeiser: I object to taking any proof upon thi question for the reason that the matter has been waived and presented to the supreme court of this State, and the decision has become res adjudicata upon that point for the reason that it has been presented  
73 to the supreme court and not sustained. The question of jurisdiction can always be presented to any court and we have the brief right here that both sides submitted on that one question and therefore I shall object to taking up the question of jurisdiction which has already been presented to the supreme court of this State.

7. The Court: That question is not before this court at this time. That matter was passed on under special appearance, you filed a special appearance here and Judge Goss passed upon it. For the time being the court refused to hear evidence in the case with reference to said motion, and therefore the objection of the defendant to the jurisdiction of the court is overruled.

To which the defendant excepts.

8. Mr. Yeiser: I move the court to take cognizance of the Act of Congress and the President of the United States and substituting James C. Davis Agent of the President under the Transportation Act of 1920 as defendant.

9. Mr. Magaw: The defendants object to the substitution on the ground that the court has no jurisdiction of the action, and the further ground that the substitution was not made within the time prescribed by the statutes of the United States and the time of making the substitution is now passed.

The objection is overruled.

To which the defendant excepts.

10. The balance of the morning was consumed selecting a jury, after which a recess was taken to 2 p. m. same day May 31, 1922, at which time all parties being present the following proceedings were had, viz:

74 11. Opening statements were then made by Mr. John O. Yeiser for the plaintiff, and Mr. C. A. Magaw for the defendant, and this was followed by the presentation of evidence in behalf of the plaintiff, as follows:

Mr. JOHN O'HARA, called as a witness in his own behalf, he being the plaintiff, testified as follows:

Direct examination by Mr. John O. Yeiser:

12 Q. State your name?

A. John O'Hara.

13 Q. Are you the plaintiff in this case?

A. Yes, sir.

14 Q. What is your age?

A. 21.

15 Q. Where did you work prior to September 13, 1919, and for whom?

A. I worked for the Union Pacific Railroad Company.

16 Q. Did you continue working for them while it was under the management of the Director General?

A. Yes, sir.

17 Q. And what did you work at, John?

A. I worked on the gantry.

18 Q. Where was it located?

A. At the Union Pacific yards at Council Bluffs.

19 Q. Are the yards there a part of this general plant here in Omaha and Council Bluffs?

A. Yes, sir.

20 Q. Now John, describe what this gantry looks like?

75 A. It is a steel structure, very large, and sets on four legs. They have wheels on them, and they run back and forth on two steel rails, and underneath them are two parallel tracks.

21 Q. Go ahead?

A. On parallel tracks where cars can be run up under the gantry and transferred, and the gantry can move back and forth on these rails, and the part that has a hoist on it runs back and forth in the opposite direction across the top of the crane which carried loads from one car to another.

22 Q. What is the power that operates the truck on top that runs crossways?

A. It is electricity.

23 Q. And what is that used for?

A. Transferring bad order cars, and taking the loads out of bad order cars into good cars.

24. Q. When you speak of loaded cars that were usually brought in under the gantry for removal, were those removals from cars that were in local hauls within the State, or are these cars from through trains moving from State to State?

A. They were going out of the State, most of them, they come in from other State- and go out.

25 Q. Before you were hurt what was the last car that was unloaded?

A. A carload of sheet iron.

26 Q. Was that a through car?

A. Yes, sir.

27 Q. And this came from outside of the State and coming through?

A. Yes, sir.

76 28. Q. And what next was to be moved, or do you know?

A. There was to be a carload of telegraph poles close to the gantry that could not be reached yet and they were to be shoved by the engine as soon as we could get an engine.

29 Q. They were not within reach of the gantry?

A. No.

30 Q. But they were inside the yard?

A. Yes, sir.

31 Q. Had you received information that they would be pushed down next?

A. Yes, sir. The foreman said it would be the next car.

32 Q. What was necessary to be done in preparation for handling that load to go on its journey?

A. It had had a rope sling on to it for some time, and the foreman said it would not be strong enough, and he said *they* they would have to make a steel cable to transfer the poles; that they were too heavy for the rope.

33 Q. After that statement was made was there any direction given with reference to making that sling?

A. The foremen said to get the cable out of the shanty that we had put in there, and to cut off a piece that would be large enough to make a cable sling.

34 Q. Who got it, if you know?

A. I do not know exactly who got it from the shanty.

35 Q. Do you remember who took part in cutting it?

A. Yes, I had one end of the cable. We had it stretched over the rail that the gangtry runs on, and my cousin done the cutting.

36 Q. Were these orders given specifically to certain men, or were they general orders?

77 A. General orders.

37 Q. Were all the orders given at that time just general orders to the gang?

A. Yes, sir.

38 Q. Who constituted this gang of men?

A. John Turner the foreman, my uncle, Mr. O'Hara and my cousin Frank, and Charlie Berg and myself.

39 Q. Your uncle was named Ed O'Hara?

A. Yes, sir.

40 Q. And your cousin Frank O'Hara?

A. Yes, sir.

41 Q. Was there any direction as to who were partners or were to work together?

A. My cousin and I generally worked together.

42 Q. You and Francis?

A. Yes, sir, and my uncle and Charlie Berg.

43 Q. They worked together?

A. Yes, sir.

44 Q. At their end of it?

A. Yes, sir.

45 Q. Which end did you work on?

A. I worked in the car that was being loaded.

46 Q. You and Francis?

A. Yes, sir.

47 Q. And Mr. Turner, what did he do?

A. He ran the crane.

48 Q. He ran the machine?

A. Yes, sir.

78 49 Q. And gave the orders?

A. Yes, sir.

50 Q. Now when this cable had been brought and cut what next was done?

A. The clamps were put on the two ends—the two ends lapped over and the clamps were put on them and tightened up, and then the cable was fastened over one of the hoists and raised up and the other end was fastened to the coupler of the coal car so that you could tighten it up and get to it easy.

51 Q. Was there any power put on it from the electric dynamo to tighten it?

A. Yes and lift the cable up and straighten it out.

52 Q. When it was straightened was it in such shape that you could handle the two ends that were brought together, making the circle?

A. Yes, sir, they were within reach.

53 Q. Speaking of these U bolts, what are they?

A. They are a bolt shaped like a letter U, and the ends are brought together on the top with a clamp, and they put that over the cable, and then you put the nuts on, and screw them down and that tightens the clamp on it.

54 Q. The part of the cable with these U bolts on, and this splice has just been brought into the court room, and I now have it before you. Do you think by feeling of this cable and bolts you can determine whether that is about like that cable?

55. (Witness feeling of section of cable marked Exhibit 1.)

A. That is about the way it was fixed.

56 Q. Feel clear around the cable.

57. (Witness feeling of all parts of the cable and splices.)

79 58 Q. Can you recognize by the feeling whether that is about what you were working on?

A. Yes, that is something like it? These are the clamps.

59 Q. Now John after the ends had been brought down, and the U bolts were put on, what if any thing was said by Mr. Turner with reference to the next step if you know?

A. Mr. Turner said that where the coupling was cut off that the strands of the wire was all loose, and he said it would be better to put a cloth or something around the ends, so that nobody would get their hands hurt when they were handling the sling, and he said to get cloth to wrap around this, and we would have to have some wire to fasten it down with.

60 Q. Was any one sent to the tool house to get wire?

A. No, sir, there wasn't any wire there.

61 Q. Had you known there was wire there?

A. There had been some, but it was larger—it was heavier wire.

62 Q. Too heavy?

A. Yes, sir.

63 Q. And was that reported to Mr. Turner that there was no light wire?

A. Yes, sir.

64 Q. Then what if anything did he say about getting wire?

A. He said to see if we could find some.

65 Q. Were those given to any one particularly or to the gang?

A. Just the gang.

66 Q. Now then after that do you know of any wire being produced?

A. My uncle found some wire in the empty coal car. I did not know where he got it from at the time.

67 Q. When did you find out where it came from?

80 A. It was after the accident happened.

68 Q. But while you were there on the job do you remember of your uncle producing any for the foremen?

A. He got this wire and he brought it up to where they were working and showed it to the foremen, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful or there would not be enough of it to do the work with.

69 Q. Then at that time how close was he to the foremen?

A. I would say about four feet.

70 Q. Was the foreman looking when he held the wire up where he could have seen?

A. He was looking right at my uncle.

71 Q. After that what if anything was done with the wire before it came to you?

A. My uncle cut off a piece to use to wrap around the cloth, and the other was handed to me. The piece that had the cylinder on it, and the wire that had been crumpled up when he tried to take it off.

72 Q. How long was the wire, the wire sticking out from the cylinder that was handed to you?

A. Four or five inches of wire, besides what was crumpled up around in the end of the cylinder.

73 Q. When this was handed to you what were you doing with it?

A. I thought that if they would not have enough of the wire that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gangtry runs on, and I had the cylinder part in my left hand  
81 and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling.

74 Q. When it struck what happened?

A. It exploded.

75 Q. And what did it do to you, John?

A. It blew my eyes out.

76 Q. Were you ever able to see anything from that instant on?

A. No, sir.

77 Q. Now John, when you had this wire in your hands, as you had the cylinder in one hand and the end of the wire in the other did you have anything on your hands?

A. I had a pair of gloves on.

78 Q. Were they new or old gloves?

A. I bought them the day before.

79 Q. And John, as it slipped through, as you pulled it, how did it slip through and strike?

A. It slipped between my thumb and fingers. I was holding it that way (indicating).

80 Q. Were you sitting down at the time?

A. Yes, sir.

81 Q. And it struck on this rail as you say?

A. Yes, sir.

82 Q. Now John did you know that that was a detonator or an explosive of any kind?

A. No, sir.

83 Q. Had anyone told you?

A. No, sir.

82 Q. What were you going to do with the wire when it was straightened?

A. I was going to use it to help fasten the cloth on so it would be—so it would stay on better.

85 Q. That is the cloth on the cable?

A. Yes, sir.

86 Q. Now John how long had you worked there on the gangtry?

A. I think it was from four to five months.

87 Q. What was your employment before this?

A. I was a trucker at the freight platform.

88 Q. Were you transferred to this position?

A. Yes, sir.

89 Q. Was that your permanent position?

A. Yes, they said I could stay there at the gangtry.

90 Q. What wages were you paid?

A. 44 cents an hour.

91 Q. 44 cents an hour?

A. Yes, sir.

92 Q. How much a day was that?

A. \$3.44.

93 Q. What was the condition of your health before you were injured?

A. I was never sick much. I never had any—

94 Q. In good health?

A. Yes, sir.

95 Q. Are you able to do anything at all?

A. No.

96 Q. You are going to the blind school now?

A. Yes, sir.

83 Q. Will you please take your glasses off and try to open your eyes and show the jurors their condition?

(Witness leaves the witness stand, goes down in front of the jury, removes his glasses, for the inspection of the jury and returns to his seat.)



98 Q. John do you use those glasses for any other purpose than a mere shield?

A. No, sir.

99 Q. To protect yourself from the gaze of people?

A. No, sir. I keep the light out of my eyes, and the dust, and keep the wind from blowing in my eyes.

100 Q. Now, what was the date of this accident?

A. September 13, 1919.

101 Q. At that time your age was what?

A. It was 18.

102 Q. While you were straightening this wire, did you know the extent that the work had proceeded in wrapping the cloth?

A. No, sir. He said they would need wire, and with what my uncle had he probably would not have enough, and I was not close enough to see whether the cloth had all been wrapped down yet or not.

103 Q. How long did you have the wire in your hands before it exploded?

A. I cannot say exactly. It was less than a minute.

104 Q. About how far were you from the cable that they were wrapping?

A. I would say about five or six feet.

105 Q. What did they do with you after the explosion?

A. My uncle and cousin took me over to the freight house and then they had an engine with an empty box car attached, and they took me to the street car line, and when I got there the doctor  
84 was down there with the automobile and took me to the hospital.

106 Q. Took you to the hospital?

A. Yes, sir,

107 Q. How long did you remain there?

A. First I went to the Jennie Edmondson hospital and Dr. Tinley said that he could not do anything for my case, and so they took me over to St. Joseph's Hospital in Omaha.

108 Q. Did you suffer any pain?

A. I can never express the pain I suffered.

109 Q. Are you able to walk around anywhere without help?

A. No, sir, I cannot leave the house.

110 Q. But can you get around in your room where you are familiar with things?

A. Yes, sir.

111 Q. But you are unable to leave the house?

A. Yes, sir.

112 Q. What medical attention was given you by the railroad company?

A. I was in the hospital in Omaha about three weeks, under Dr. Wheery. They had medicine put in my eyes a couple times every day.

113 Q. That was the eye specialist for the railroad?

A. Yes, sir.

114 Q. And you accepted his services?



A. Yes, sir.

115 Q. And put yourself under his care as your physician?

A. Yes, sir.

116 Q. Did you strike this cap against the rail on purpose?

A. No, sir.

117 Q. How were your eyes before the injury? I mean before this date?

A. There was nothing the matter with them. I could see good.

118 Q. You had good eye sight?

85 A. Yes, sir.

119 Q. How about feeding yourself at the table, do you have to have assistance?

A. Yes, for the cutting of the meat or something like that.

120 Q. How about the location of your coffee, tea and food?

A. After they tell me where it is setting I can find it.

#### Cross-examination.

#### Questions by Mr. C. A. Magaw:

121 Q. Mr. O'Hara whereabouts did you reside at the time of the explosion which resulted in the loss of your eyes?

122 Mr. Yeiser: Objected to by the plaintiff as being immaterial and not proper cross-examination.

The objection is overruled.

To which the plaintiff excepts.

A. Council Bluffs.

123 Q. Council Bluffs, Pottawattamie County, Iowa?

A. Yes, sir.

124 Q. How long had you lived there prior to the accident?

A. I think it was 11 years or 12. I do not know which.

125 Q. Do you still live in Pottawattamie County, Iowa?

A. Yes, sir.

126 Q. And have lived there continuously, have you?

A. Yes, sir.

127 Q. This gantry where the explosion occurred which resulted in the loss of your eyes is situated in Council Bluffs, Pottawattamie County, Iowa? is it not?

A. Yes, sir.

128 Q. You were injured then in Council Bluffs, Pottawattamie County, Iowa, were you?

86 A. Yes, sir.

129 Q. And that is where you lived at the time you received your injuries, was it?

A. Yes, sir.

130 Q. And where you had lived for some time prior thereto, and where you still live?

A. Yes, sir.

131 Q. When was the first time that you saw the wire?

A. When my uncle gave it to me.

132 Q. You had not seen the wire at all until he handed it to you?

A. No, sir, I knew he had it, and I heard him tell the foreman that he had the wire, and asked him if it was all right, but I did not see it.

133 Q. Where were you then?

A. I was standing by the gantry about five or six feet from it.

134 Q. Where was Mr. Turner standing?

A. He was standing by the cable in the middle of the track.

135 Q. What were you doing?

A. I was standing there watching them put on the clamps.

136 Q. Were you engaged in any work yourself at that time?

A. No, sir, not at the present moment.

137 Q. When was the first time that you saw the cylinder or cap that exploded?

A. My uncle gave me the wire and I started to straighten it out is when I saw the cap.

138 Q. You saw the cap or the cylinder as your uncle handed it to you?

A. Yes, sir.

139 Q. Did your uncle say any thing to you when he handed it to you?

87 A. No.

140 Q. Did you say anything to him?

A. No, sir.

141 Q. Did anybody else say anything to you at that time, any of the other men there?

A. No, not that I remember of.

142 Q. Where was Mr. Turner when your uncle handed you the cap with the wire attached to it?

A. He was a few feet away and standing by the cable.

143 Q. What was he doing?

A. I think he was working on the clamps.

143½ Q. Did you say any thing to him about having the wire or the cap?

A. No, sir. He had said that he needed wire so I thought that if he still needed some I would try to fix it up so it could be used.

144 Q. You did not call his attention to the fact the wire that your uncle gave you had a cap or cylinder on the end of it?

A. No, sir.

145 Q. As far as you know Mr. Turner the foreman did not know that you had it?

A. I do not suppose he knew I had it. I knew he wanted wire, that is what he said.

146 Q. Do you remember when you were out at St. Joseph's Hospital of making a statement to a court reporter or stenographer, by the name of Miss Gray?

A. I do not remember the name, but I know there was someone there.

147 Q. You remember someone coming out there a short time after you were hurt and taking your statement in shorthand, do you?

A. I do not know whether it was taken down in shorthand, but I

88 know some lady came with a man, and I do not know whether she took it in shorthand or not.

148 Q. They asked you some questions about how you were hurt, did they not?

A. Yes, sir.

149 Q. That was on September 25th, 1919, was it not?

A. I do not remember the date.

150 Q. Well, it was several days after you were injured, was it not?

A. It was a few days later, yes, sir.

151 Q. Do you remember of being asked—Do you know Mr. Van Noy one of the claim adjusters for the Director General?

A. I do not know him very well. I heard his name is all.

152 Q. He was the man that was there and asked you the questions at the hospital at the time you are speaking of, was he not?

A. I think that was the name.

153 Q. Do you remember of Mr. Van Noy asking you this question: "Q. How did you happen to get injured, John?"

A. I do not remember that question.

154 Q. He may have asked you that may he not?

A. He may have.

155 Q. And do you remember of making this reply to that question: "A. We were fixing that cable and looking for a piece of wire to wire some canvass on to the cable so we would not get our hands on it, and my uncle found this bit of wire, and he cut the wire off, and it had a little brass tube on the end of it. I had the brass tube, and I was not doing any thing, so I tapped that little tube. It had yellow stuff in it, and I was knocking that powder out, or whatever it was. I do not know, and I was tapping that thing and I turned it around and hit it on the other end, and the thing went off."

89 Do you remember making that answer to that question?

A. I never made an answer like that, no, sir. I never heard of the yellow powder, if that was done, before my uncle came over. I never heard of the yellow powder until after my uncle told me.

156 Q. Were you asked this question after that: "Q. It exploded?" and did you make this reply "A. Yes, I was tapping the open end. One end was closed and I was trying to get the powder out of it, and when I hit the closed end it went off." were you asked that?

A. No, sir.

157 Q. Do you remember being asked this question: "Q. The thing blew all to pieces," and did you answer that question: "A. Yes."?

A. I do not remember that question either.

158 Q. Do you remember of being asked this question on that occasion: "Q. You say your uncle Ed. O'Hara gave you this little copper tube"? Do you remember being asked that?

A. No, sir.

159 Q. Do you remember making this reply to that question: "Q. He cut the wire off and I took it, about the same as giving it to me," do you remember that?

A. No, sir.

160 Q. Didn't you further say in answer to that question: "A. I went up after he cut it off, and he held it in his hand," did you say that?

A. No, sir.

161 Q. You do not say that you were not asked those questions and that you did not make the answers as indicated, but that you do not remember of making them, is that it?

A. I do not ever remember answering any of those questions.

90 162 Q. You may have been asked them, and may have answered them as I have indicated, may you not; may not that be true?

A. I might have answered them.

163 Q. I believe you stated you had been working at this gantry for how *how*—how long did you say you had been working at this gantry prior to the day you were injured?

A. I said I thought it was about four or five months.

164 Q. And did you work in the day time?

A. Yes, sir.

165 Q. The Director General did not use any explosives or caps of this character in connection with that work at the time you worked there, did he?

A. No, sir.

166 Q. Had any explosives of any kind been kept on the premises there as far as you know, prior to the time you were hurt?

A. No, sir.

167 Q. It was not a part of the duties of any of the men with whom you were working to use explosives of any kind, was it?

A. No, sir.

168 Q. At the time your uncle handed you the wire and the cap attached to it, where were you standing with reference to the cable they were tying the cloths on?

A. I was about five or six feet.

169 Q. Which direction?

A. I think it was south-west. A little to the west-south.

170 Q. Assuming that the tracks running to the gantry ran east and west you were on the south side of the car that the cable was fastened to, were you?

A. Yes, sir.

91 171 Q. And as I understand it your uncle E. W. O'Hara was right at the south-east corner of the car, working and tying the cloths on the cable?

A. He was working on the cable, yes.

172 Q. After he gave you the wire with the cap attached to it, how far did you go before you sat down?

A. All I had to do was to take about one step and that would be to the rail.

173 Q. And were you sitting with you feet on the north side of the rail, that you were sitting on?

A. Yes, sir.

174 Q. And you were facing towards the north, were you?

A. Facing towards the—kind of north-east.

175 Q. Northeast?

A. Yes, sir.

176 Q. You were on the south rail of the gantry track then.

A. Yes, sir.

177 Q. And your uncle was north-east of you, too, so you were practically facing your uncle?

A. Yes, sir.

178 Q. Where was Charlie Berg?

A. I do not know just exactly where he was. He was by the cable too.

179 Q. Do you know where Francis O'Hara was?

A. I do not remember where he was.

180 Q. At the time the cap exploded were you injured any place except in your eyes and face?

A. I had a few marks on my leg.

181 Q. Which leg?

92 A. The right leg.

182 Q. Whereabouts on the right leg?

A. Between the hip and the knee.

183 Q. Did you get any injury to the hand?

A. I had a few marks on my one finger on my left hand.

184 Q. Of your left hand?

A. Yes, sir.

185 Q. Which finger of your left hand?

A. The fore finger.

186 Q. You had particles of the cap blown into your face on both sides, did you not?

A. Yes, sir.

187 Q. As I understand you the right side of your right leg also received a part of the discharge from the explosion?

A. Yes, sir.

Redirect examination.

Questions by Mr. John O. Yeiser:

188 Q. John, you speak of the fact that you may have answered some parts of these questions as suggested; did you give any answer contrary to the testimony you have given at this time?

189. Mr. Bockes: Objected to by the defendant as calling for the conclusion of the witness, and not proper re-direct examination.

The objection is sustained.

To which the plaintiff excepts.

190 Q. John did you ever see any of this yellow powder before your injury?

A. No, sir, it was after the injury.

93 191 Q. When is the first you knew of it?

A. When my uncle told me of it when I was in the hospital.

192 Q. Had your uncle said anything about trying to get that wire out and getting the yellow powder in his hands?

A. Not before the accident.

193 Q. A'ter the accident?

A. After the accident I heard it.

194 Q. And if anyone had asked you about it you may have spoken about what your uncle had told you, after you got the information from your uncle?

A. Yes, sir.

195 Q. But before that did you in any way know anything about yellow powder being connected with it?

A. No, sir.

196 Q. Now, another thing, did you say anything to them about your not doing any thing when you had that cap?

A. To whom?

197 Q. To those people?

A. No, sir.

198 Q. Were you doing something ?

A. Yes, sir.

199 Q. And what were you doing?

A. I was attempting to straighten the wire so that it could be fit to use for the purpose of what the foreman said *were* were to get it for.

94 Recross-examination.

Questions by Mr. C. A. Magaw:

200 Q. You remember being asked this question by Mr. Van Noy; while you were in the St. Joseph's Hospital at the time we have referred to, a few days after the injury, referring to the cap, did he ask you this: "Q. And was it full of powder?" do you rember him asking you that question, or anything of that kind?

A. No, sir.

201 Q. And do you remember of answering it: "A. Some kind of yellow stuff, I do not know whether it was powder or not"?

A. I never heard of yellow powder until after the accident. After I was in the hospital.

202 Q. Well, at the time your uncle gave you the wire with the cap attached to it, did you look at the cap?

A. No, sir. I just—not closely. Closely I did not examine it.

203 Q. How big was this cap or cylinder?

A. I could not say exactly, about an inch or a little more—an inch and a quarter.

204 Q. Long?

A. Yes, sir.

205 Q. And how big -round?

A. About as big as a pencil.

206 Q. About as big as that pencil? (Handing pencil to witness.)

A. Yes, sir.

207 Q. Will you feel of this, John?

95        208 (Handing the witness Exhibit 3, being a dummy detonation cap and wire attached.)

209 Q. I have asked to have this marked Exhibit 3. I will ask you to feel of this wire which has been marked for identification Exhibit 3, and I will ask you whether or not that is substantially the same kind of a cap and wire that your uncle gave you prior to the time you injured your eyes? (Witness feeling of Exhibit 3.)

A. I believe the one—that one may be a little larger than this. It was not as small -round.

210 Q. Did it have substantially the same kind of wire on it?

A. I do not remember what kind of wire it was on.

211 Q. It would be about the same length—I mean the cap?

A. The cap?

212 Q. Yes?

A. About the same length, yes, a little bit longer.

213. Mr. Yeiser: The plaintiff offers in evidence Exhibit 2, the same being a part of the rail on which the explosion took place, it being the exhibit that was identified in the former trial, as having been sawed from the rail where the explosion took place. We offer that portion of Exhibit 2 and ask the jurors to put their fingers into the indenture.

214. There being no objection Exhibit 2 is received in evidence, is shown to the jury, and they felt of same, and said Exhibit 2, by agreement of the parties hereto Exhibit 2, being of a bulky nature is attached by reference, either party having the right to present the same at any future hearing in this or the Supreme Court.

Witness excused.

96        FRANCIS W. O'HARA, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. J. C. Travis:

215 Q. State your name?

A. Francis W. O'Hara.

216 Q. Are you related to the plaintiff?

A. Yes, sir.

217 Q. What is the relation?

A. I am a cousin.

218 Q. How long have you known John?

A. About all his life.

219 Q. Have you ever worked with him?

A. Yes, sir.

220 Q. Where at?

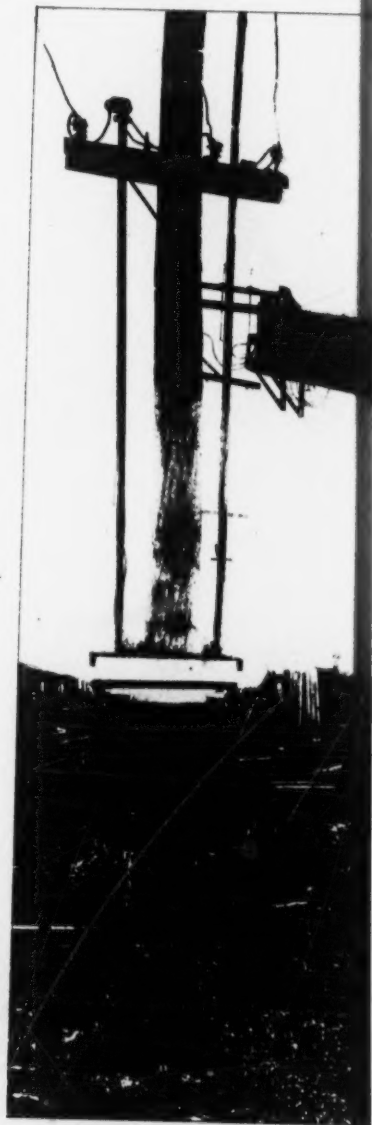
A. At the Union Pacific yards in Council Bluffs.

221 Q. What doing?

A. At the gantry.

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Louis T. Fortwick	OPERATOR

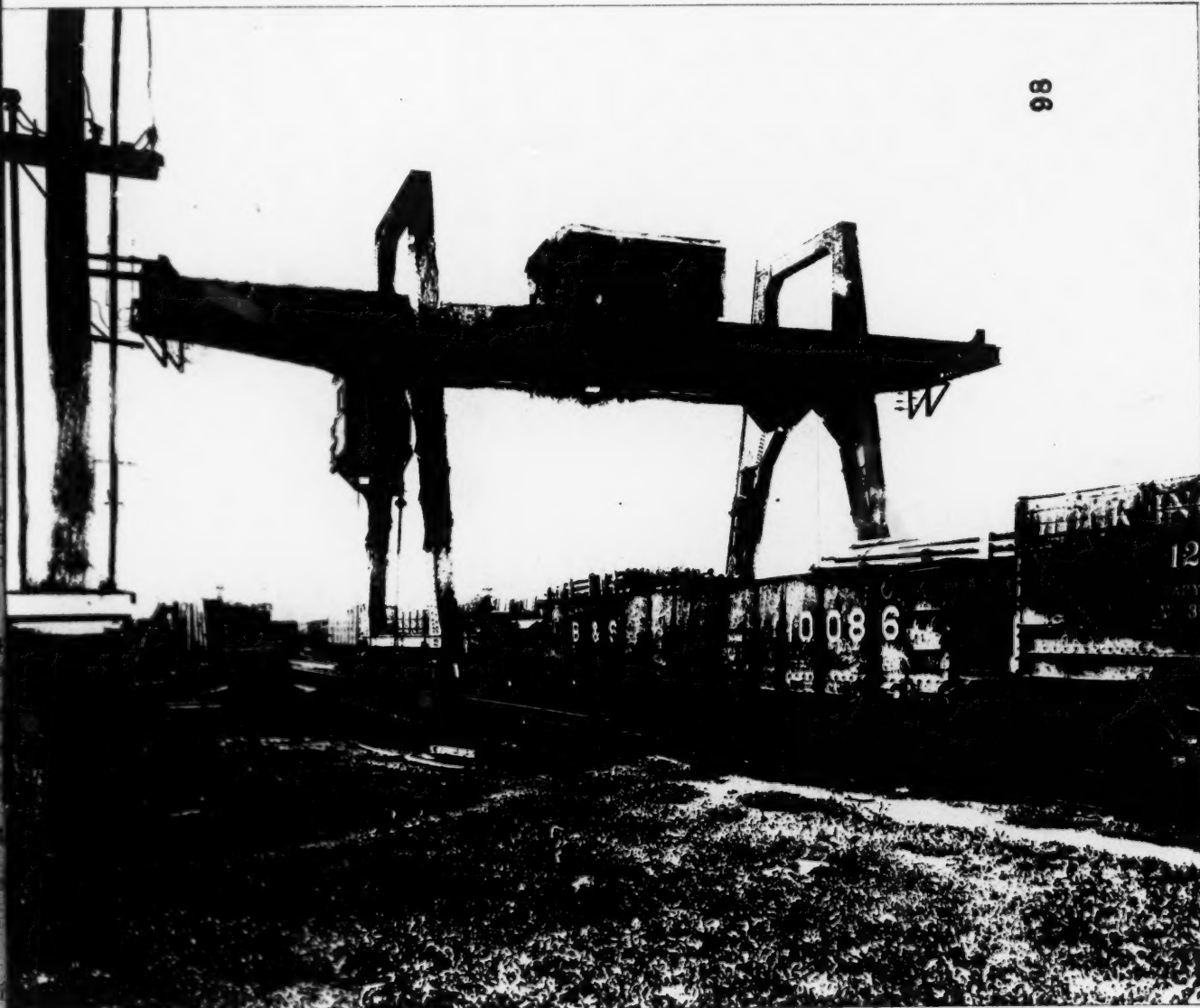
✓ Exhibit 4 to testimony of F. W. O'Hara  
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*45 Exhibit 5 testimony of  
F. W. O'Hara*





222 Q. Did you work with him at any other place than at the gantry?

A. Yes, on the platform.

223 Q. When did you first go to work for the Union Pacific Railroad?

A. March 26th, 1919.

224 Q. At that time was it under federal control?

A. Yes, sir.

225 Q. What was the first job you had in the Union Pacific?

A. It was over at the gantry. I hired out to the gantry.

226 Q. Were you working permanently at the gantry?

A. No, I was not. If the work was slack there and I had nothing to do there they sent us over to on the platform trucking.

97 227 Q. And how long did that continue?

A. For two or three months I think.

228 Q. After that time what disposition was made as to whether or not you would be permanently employed at one particular place?

A. Oh, it was raining there—we had worked on the gantry for a week I guess, and one day it was raining, and they can't work on the gantry, and they wanted Johnnie and I to go over to the gantry. We told them we did not have our rain clothes there to go to work there in the rain. The foreman said we did not have to. So in the afternoon he came over to Johnnie and I and told us to go to work on the gantry, and we said we would if we could work steady, and he said we could stay there.

229 Q. After that did you work steady at the gantry?

A. Yes, sir.

230 Q. In working at the gantry who comprised the crew at the gantry?

A. My father and John and Charlie Berg and John Turner the foreman and myself.

231 Q. How did you pair up if you paired up?

A. Johnnie and I worked together as helpers in the cars where they were—together in the good cars when they transferred the bad order cars into the good cars and my father and Charlie Berg worked in the bad order cars.

232 Q. What did Turner do?

A. He was running the crane.

233 Mr. Travis: I now ask permission of the court to take from the bill of exceptions of the former trial of this case some of the exhibits to be used in this trial.

234. Permission is granted.

(Here follow Exhibits 4 and 5, marked side folio pages 98 and 99.)

100        235 Q. I now hand you pictures marked Exhibits 4 and 5 are they correct pictures of what they purport to depict?

236. (Handing the witness Ex. 4 & 5, being photographs of the gantry in question.)

A. Yes, sir.

237 Q. What are they photographs of?

A. They are pictures of the electric crane there where we transferred the cars.

238 Q. Are they fairly accurate photographs?

A. They are very good photographs.

239. Mr. Travis: The plaintiff offers in evidence Exhibits 4 and 5, being the photographs just identified of the gantry.

240. There being no objection same are received in evidence are shown to the jury, and here follow:

101        243 Q. Now, Mr. O'Hara these photographs show this steel structure and up-rights, how many rails are under the gantry?

A. Two tracks, four rails.

244 Q. But the gantry runs east and west upon the two rails of its own?

A. Yes, sir.

245 Q. And the gantry rail sets on a wooden timber?

A. Yes, sir.

246 Q. As shown in the photographs?

A. Yes, sir.

247 Q. About how high is that timber above the ground?

A. The rail is about 18 inches to two feet in height.

248 Q. And what is the distance between the spans of the gantry?

A. That is the gantry rails?

249 Q. Between the gantry rails?

A. It is wide enough for two cars.

250 Q. You don't know what it is in feet?

A. No, I don't.

251 Q. On the day of this accident where was the gantry setting with reference to the shanty that has been referred to in the testimony?

A. Right across from the shanty. It was about even with the shanty.

252 Q. What part of the gantry was even with the shanty, if you know?

A. About half of the gantry was—the gantry set about half way between the gantry and the shanty. The gantry about covered half of the shanty.

253 Q. That morning what work had you done?

A. We unloaded a car of sheet iron.

254 Q. What was done with the car of sheet iron after it was unloaded?

102 A. It was still setting there in the yards down a little ways.

255 Q. What kind of car was it that the sheet iron was unloaded from?

A. It was a coal car.

256 Q. Where was it sitting with reference to the shanty and the gantry?

A. When we were unloading?

257 Q. Yes?

A. Right alongside of the shanty under the gantry.

258 Q. Now then about how many feet would the car be from the shanty?

A. About ten feet.

259 Q. After you had finished unloading that car of sheet iron what if anything else was to be done?

A. There was a car of telegraph poles to be transferred.

260 Q. How did you get that information?

A. The foreman told us that there was a car of telegraph poles to be transferred.

261 Q. What if anything was done with reference to preparing for that car of poles?

A. The car of poles was not yet in reach of the gantry, and the foreman told us that we would have to make a sling out of some cable we had there in the shanty to transfer it with.

262 Q. Did you have any other slings on the job at all there?

A. Yes, there was a rope sling and a chain sling.

263 Q. And do you know why it was that one of those was not used for this particular load?

A. Well, sir, the rope sling was not heavy enough, and the chain sling would scar the poles by lifting them up with it.

264 Q. Now, after the order was given by the foreman to make this cable, what if anything was done?

103 A. The men went in and got the cable and brought it out there to—and cut off enough to make the sling out of.

265 Q. Where did they get the cable?

A. Out of the shanty.

266 Q. Was it a new cable or old?

A. It was an old cable that had been used there by the hoist at one time.

267 Q. A hoist on the gantry?

A. A hoist on the gantry.

268 Q. Do you know why it was taken off of the gantry?

A. I do not know what it was taken off for, unless it was not to be used, or something, on the gantry.

269 Q. What was done in regard to the cable after it was taken from the tool house?

A. He told us to cut off enough or to make a sling out of it.

270 Q. How much did you cut off?

A. About 20 or 30 feet.

271 Q. Who cut it?

A. I did.

272 Q. Did you have any assistance in cutting it?

A. Mr. Turner held one end of it and Johnnie held the other end.

273 Q. By Johnnie you mean the plaintiff in this case?

A. Yes, sir.

274 Q. After it was cut what if anything was done?

A. It was clamped together, both ends were clamped together to make a rope out of it; to make a sling out of it.

275 Q. What if anything was done?

A. He told us we would have to get some wire and cloth to put around the ends of it to keep from scratching our hands.

104 276 Q. Who told you that?

A. The foreman.

277 Q. In putting the clamps on the cable where was the cable at the time the clamps were put on?

A. We had it on the ground. After we got the clamps on, part way, enough to hold it, we put it around the end of the coupler on the car and up on the hoist, and raised it up to tighten it.

278 Q. At that time you say the foreman said something about getting rags and binding them on the end of the cable?

A. Yes, sir.

279 Q. Did he do anything after that—the foreman?

A. He went up in the cab and tightened up the cable, that was all.

280 Q. He went in the cab?

A. To tighten up the sling.

281 Q. What if anything was done with reference to procuring some cloth and wire?

A. He told someone to get some wire and cloth.

282 Q. Did anybody get it?

A. They got some cloth, but there was no wire there.

283 Q. Was there any wire on the job?

A. There was some heavy wire there, but it wasn't anything that you could wrap around the cable.

284 Q. Did everybody know about the condition of affairs there?

A. Yes, sir. That was the way about all the time.

285 Q. Do you know whether the foreman knew that?

A. I suppose he did, the rest did.

286 Q. Do you know whether the fact that wire was not on the job there had been reported to the foreman that day?

105 A. I don't know. I would not say it was not.

287 Q. When he asked someone to get the wire was the wire procured?

A. Yes, sir, my father told—he told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that.

288 Q. Your father got in the car and got the wire?

A. Yes, sir.

289 Q. And then what if anything did he do?

A. He asked the foreman if that was all right.

290 Q. Right at that point, what kind of a day was it? as to heat?

A. It was hot and sultry that morning.

291 Q. What about noon?

A. It was hot and sultry.

292 Q. Was the sun shining?

A. Yes, sir.

293 Q. It had been shining the latter part of the morning?

A. Yes.

294 Q. After you got the wire you say your father showed it to the foreman?

A. Yes, sir.

295 Q. I wish you would show the jury how it was displayed to the foreman?

A. What?

296 Q. How it was displayed to the foreman?

A. He held it up to the foreman and asked him if it was all right (witness illustrating).

297 Q. You saw him do that?

101 A. Yes, sir.

298 Q. And you heard him say that?

A. Yes.

299 Q. What if anything did the foreman say?

A. He said it was all right but there would not be enough of it, My daddy said it will have to be because that is all there is.

300 Q. How far was your father from the foreman at the time he held the wire up?

A. About five or six feet.

301 Q. How far were you from the foreman, or from your father?

A. I was about four or five feet from my father.

302 Q. Now after that what if anything occurred?

A. Well, the foreman sent me to the rip track to see if we could find some more U bolts.

303 Q. You went down on that mission?

A. Yes, sir.

304 Q. Did you return?

A. Yes, sir.

305 Q. And at the time you returned what if anything occurred?

A. I told the foreman they did not have U bolts over there.

306 Q. And then what if anything did the foreman say to you?

307 A. He told me to come around and help him on the cable.

308. Q. When you came back to that at that time did you notice your cousin John?

A. Yes, he was standing there, him and Charlie Berg.

309 Q. Do you know what they were doing?

A. No, I do not.

310 Q. Where was he sitting?

107 A. On the rail.

311 Q. On the gantry rail?

A. Yes, sir.

312 Q. Where as regards the end of the car on which you fixed the cable?

A. About five or six feet west.



313 Q. The foreman ordered you to come to his assistance, did he?

A. Yes, sir.

314 Q. And did you go?

A. Yes, sir.

315 Q. What if anything occurred after that time?

A. I just partly came around there when I heard the explosion.

316 Q. How far did you go after you got even with John before you heard the explosion?

A. About ten or twelve feet.

317 Q. You were all busy at that time?

A. Yes, sir.

318 Q. Doing something?

A. Yes, sir.

319 Q. Did you go to the hospital with John?

A. Yes, sir.

320 Q. Who accompanied him?

A. My father.

321 Q. Did you notice his condition at the time of the explosion and immediately after? that?

A. His face was all covered with blood.

322 Q. His face was covered with blood?

A. And the forehead.

323 Q. And the forehead?

108 A. Yes.

324 Q. Do you know whether or not John was wearing gloves or otherwise?

A. Yes, sir, he was wearing gloves.

325 Q. What kind of gloves did he have on?

A. New leather gloves.

326 Q. New leather gloves?

A. Yes.

327 Q. Do you know how new these gloves were?

A. No, I do not. He did not have them over a day or two. They were still new.

328 Q. I will ask you to step down here and look at this cable, and the rag and the wire attached around the rag, and U clamps—the U bolts and the clamps fastened thereon, and ask you to state whether or not after examining them—

A. I did not put the wire and the rags on.

329 Q. State whether or not that is the cable—a portion of the cable which was being worked on at the time of the accident?

A. It looks the same, only it is not so long.

330 Q. And how is it about the U bolts and the clamps, are they the same?

A. They are the same.

331 Q. And the cloth can you identify it?

A. No, because I did not get it.

332 Q. Did you have occasion—did you work there after this accident Mr. O'Hara?

A. One day.

333 Q. One day?

A. Yes, sir.

334 Q. Did you at any time examine the cloth around the cable?

A. No, I did not.

109 335 Q. Are you able to identify the wire, the small wire bound around the cable?

A. No, only it looks about the same as the wire he had. I did not have it in my hands. I did not pay particular attention to it.

336. Mr. Travis: The plaintiff offers in evidence the portion of cable, the clamps, the U bolts together with the cloth and wire—the binding cloth, identified as Exhibit 1.

337. There being no objection same is received in evidence is exhibited to the jury, the jury being able to observe it during the entire trial; and being of a bulky nature same is attached hereto by reference, either party having the right to present same to this or the supreme court at any time, same being retained in the custody of the reporter.

338. It being 5 o'clock the court adjourned the further hearing of this case to 9 o'clock a. m. Thursday June 1, 1922, at which time all parties being present the following proceedings were had, viz:

110 FRANCIS W. O. HARA continued in his direct examination, as follows:

Questions by Mr. Travis:

339 Q. Did you actually see the explosion?

A. No, sir.

Cross-examination.

Questions by Mr. Charles A. Magaw:

340 Q. E. W. O'Hara is your father?

A. Yes, sir.

341 Q. He is sometimes called Ed O'Hara?

A. Yes, sir.

342 Q. And John O'Hara is your cousin?

A. Yes, sir.

343 Q. And John O'Hara the plaintiff is a nephew of your father?

A. Yes, sir.

344 Q. Had you been working with John for some time prior to the accident?

A. Yes, sir.

345 Q. About how long at this gantry?

A. From the 26th of March until the 13th day of September, off and on.

346 Q. You worked every day?

A. Yes, sir.

347 Q. Were your hours there from eight in the morning to 4.30 in the afternoon?

A. Yes, sir.

348 Q. What time of day was it when the accident occurred?

111 A. It was about one o'clock in the afternoon. About 1.30 I judge.

349 Q. At what time did you go to work that morning?

A. Eight o'clock.

350 Q. And had you done any work that day?

A. Yes, sir.

351 Q. What had you done?

A. Transferred a load of sheet iron.

352 Q. By that you mean that you took a load of sheet iron out of one car and put it into another car?

A. Yes, sir.

353 Q. Into a perfect order car?

A. Yes, sir.

354 Q. When did you do that?

A. We were on it about all morning.

355 Q. You started on it the first thing when you went to work that morning?

A. Yes, sir.

356 Q. And about what time was it when you finished that job?

A. It was about 11 or 11.30.

357 Q. What did you do then?

A. We had our dinner.

358 Q. Were there any other cars set at the gantry to be transferred at that time?

A. The car was set. There was a car of poles there that was to be unloaded as soon as they pushed it down.

359 Q. Before you could unload the cars they had to be set in under the gantry with a switch engine, did they not?

A. Yes, sir, so we could unload them with the crane, in order to work on them.

Witness excused.

112 EDWARD W. O'HARA, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:—

Direct examination by Mr. J. C. Travis:

360 Q. State your name?

A. Edward W. O'Hara.

361 Q. Are you any relation to the plaintiff in this case, John O'Hara?

A. Yes, uncle.

362 Q. Uncle?

A. Yes, sir.

363 Q. And you are the father of the young man who just preceded you on the witness stand?

A. Yes, sir.

364 Q. Mr O'Hara what was your occupation about September 13, 1919?

A. I was working for the Union Pacific.

365 Q. Where?

A. Working at Council Bluffs at the gantry.

366 Q. You said you worked for the Union Pacific?

A. Yes, sir.

367 Q. Do you know whether or not the railroads at that time were under the control of the Director General of Railroads?

A. They were.

368 Q. You were working then for the Director General of Railroads?

A. Yes, sir.

369 Q. Was that true of all the members of your crew at that time?

A. Yes, sir.

370 Q. That was true of all the members of your crew?

A. Yes, sir.

371 Q. I will ask you what your duties at the gantry at that time, yours and that of the crew in which you were?

A. Transferring heavy material.

372 Q. What?

A. The transferring of material from bad order cars into good ones, and fixing loads.

373 Q. Transferring and fixing the loads?

A. Yes, sir.

374 Q. What do you mean by fixing them?

A. Sometimes a load would get out of shape on a car and before it could be forwarded it had to be straightened before it could proceed on its journey.

375 Q. What was the character or the nature of the material that was being transferred or fixed in these cars?

A. Practically everything.

376 Q. What?

A. Pretty near everything in the shape of heavy material. Guns, automobiles, tractors, steel, engines and stuff like that.

377 Q. No light stuff?

A. No.

378 Q. How many loads would you handle in a day?

A. It depends on the condition of the load.

379 Q. Did you ever have occasion to notice the tagging on the cars?

A. Sometimes the man's name or the manufacturer was on, and sometimes it was not.

380 Q. Did you ever get orders to, and did you ever transfer a load that originated in Iowa and that ended in Iowa, that was handled by your gantry?

A. I think not, no.

114 381 Q. Now, Mr O'Hara, referring to the date of September 13th, 1919, being the day of the accident, I will ask you what work you performed that morning?

A. We transferred a load of sheet iron that forenoon.

382 Q. What time did you go to work that morning?

A. Eight o'clock.

383 Q. What time did you start to work on the car of sheet iron?

A. A very few minutes after eight. As soon as we could get the tools ready.

384 Q. What was that operation, a straightening of the load or transferring of it?

A. Transferring.

385 Q. How was that operation accomplished, what did you do?

A. We had a bunch of chains in there, and lifted it up and put it in the other car.

386 Q. Where was the other car situated in relation to the car you transferred the sheet iron into?

A. Right along side of it, to the north of it, approximately.

387 Q. After that carload of sheet iron was unloaded was the car moved from the gantry or not?

A. It was not.

388 Q. How long did it stay there under the gantry?

A. It set there when I took the boy to the hospital.

389 Q. What kind of a car was it?

A. That they were transferring from?

390 Q. Yes?

A. A wooden coal car, a Norfolk & Western.

391 Q. In transferring that car of sheet iron where were you?

A. I was in the car we were unloading.

115 392 Q. You were in the coal car?

A. Yes, sir.

393 Q. Did you notice the condition of the coal car as to whether or not there was anything in there besides the sheet iron?

A. Some coal in it; it had not been thoroughly cleaned.

394 Q. Did you notice anything else in the car that morning besides the coal and the sheet iron?

A. Nothing more than that little piece of wire that I was kicking out of my way.

395 Q. You noticed a piece of wire?

A. I did not pay any attention to it.

396 Q. What time did you complete the loading of that car?

A. Somewhere around in the neighborhood of 11.30 I guess. Maybe 11.

397 Q. And after that what did you do?

A. We put our chains and things away that we were working with, and then we had dinner.

398 Q. And that operation I believe you stated was accompanied by a chain swing?

A. It was.

399 Q. Were there any other loads to be handled that day?

A. There was a load of telegraph poles setting above the crane, but it was not where we could get to it.

400 Q. How far up?

A. It had to be set in by the switch engine

401 Q. Now, how did you know about that carload of telegraph poles?

A. We could see that it was in bad condition from where we were.

402 Q. Was anything said about the carload of telegraph poles by the foreman?

116 A. The foreman said that they were to fix it right after dinner as he had been to the yard office.

403 Q. Was there any directions given aside from that by the foreman in regard to this car of telegraph poles?

A. He said that we would have to make a swing out of a piece of cable, as the rope was not heavy enough to handle them.

404 Q. He said a swing would have to be made out of a piece of cable?

A. That we would have to make a cable swing.

405 Q. What cable?

A. We had some cable in the shanty, in our tool shanty.

406 Q. What kind of cable?

A. It was cable we had that had been used on the hoist before, and we thought probably we had better put on a new one, which we did; it was worn but it was all right for what we were going to use it for; it was all right for that purpose.

407 Q. What did you do after that if anything?

A. Some of them got this cable out and cut off about what we wanted of it. I do not know who took it out. I was at something else. I did not help take it out. Some of the boys took it out.

408 Q. Did you help cut it off?

A. No, I did not.

409 Q. After it was taken from the shanty and cut off what then if anything was done?

A. It was clamped together, put the ends on, like it sets there, and turned it around.

410 Q. I will call your attention to this Exhibit 1, the exhibit identified as Exhibit 1, examine that and state whether or not that is the cable, or a cable similar to the one that you have been testifying regarding?

117 A. Yes, I think that is it.

411 Q. Now, after the cable was brought out and cut, and got in this position, what then if anything was done with it?

A. I suggested that we get a cloth, and tie it around the end of the cables on account of where they were cut they were so rough that they would tear our hands off.

412 Q. Was it put on before the clamps were put on?

A. No, the clamps were attached, they were not thoroughly tightened, but they were attached on the ground and screwed up, so we could screw them, and the one cloth was put on the ground. I and Berg put it on ourselves.

413 Q. You and Mr. Berg did?

A. Yes.

414 Q. What if anything was said as regards the cloth?

A. They said they would have to put on a cloth.

415 Q. Was anything said by the foreman in regard to the cloth?

A. He said we would have to cover it up or we would cut our hands on it, and we should tie a cloth on it.

416 Q. Who did he say that to?

A. Nobody in particular.

417 Q. The whole gang?

A. The whole crew.

418 Q. What if anything was done then by the gang?

A. Well, they got the cloth and had to have something to tie it on with. I said we would have to tie it on with some wire, string would not be heavy enough. We did not have any. So I happened to think of the piece I had seen in this car that I had transferred the sheet iron from. I went in there and got it, and when

I got it it had this cylinder on it. I did not know there  
118 was a cylinder on it until after I took it up. There was two strands of wire, separate strands of wire coming out of the end of the cylinder I tried to twist it off. It did not go and I picked up a hammer that was laying there, and I laid it across the rail and I cut it off. I took one piece with the cylinder and hung it up in the shanty, in the tool house, and the other piece I took down and I and Mr. Berg wrapped it around the cable. We tightened up the bolts what we could and then the cable was hung on a hook and raised up in the air and the other end put in the coupler of the car in order to take the slack out of it so we could retighten the bolts. That was what was done with it at that time.

419 Q. Did the foreman tell you where to get the wire? Anything said about it?

A. Well, he knew we did not have wire for that, we had to have some some place to tie it with.

420 Q. Now when you got the wire what if anything did you do with it before you used it?

A. I crawled out of the car with it and Turner was just coming down out of the crane, as he had been up there for some purpose, and I was walking down there, and I was just a little ahead of him, and I held it up, I says, I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is.

421 Q. Now was the cap exposed at that time so the foreman could have seen it if he had looked?

A. Yes, if he had looked.

422 Q. How far was he standing from you at that time?

A. Oh, he was not over 7 or 8 feet possibly, not over that I do not think. I was a little east of him. He was just coming off of the ladder.

119 423 Q. Was he facing you at that time?

A. Yes, he was facing me, and my back would have been turned to him—back and side.

424 Q. When he said it would do if there was enough of it, was he looking at it, towards it?

A. I presume he was.

425 Q. What?

A. I presume he was or he would not have made that remark.

426 Q. Were his eyes directed towards you?

A. He was facing me.

427 Q. What?

A. He was facing me.

428 Q. I hand you a wire with a cap attached which has been identified as Exhibit 3, and I will ask you whether or not that is a wire somewhat similar to the wire you have been testifying regarding?

429. (Handing the witness dummy cap and wire marked Exhibit 3.)

A. Yes, it is about the same thing.

430 Q. And referring to the cap on the end of it, is that similar?

A. Very much. About the same wire.

431 Q. About the same kind of wire?

A. Yes.

432 Q. And the same kind of cap as you found in the coal car and as you exhibited to the foreman?

A. Yes, sir.

433 Q. And as you afterwards used to wrap around the cloth you testified about?

A. Yes, sir.

120 Mr. Travis: The plaintiff now offers in evidence this dummy cap and wire, identified as Exhibit 3.

There being no objection same is exhibited to the jury, and here follows:

### Exhibit 3 (Dummy Cap and Wire).

121 [NOTE.—Exhibit 3 to testimony of E. W. O'Hara. Dummy cap & wire. Physical exhibit omitted.]

122 435 Q. Now, Mr. O'Hara you say that you twisted the wire and cap and attempted to twist the wire from the cap?

A. I tried to.

436 Q. Now, at the time you did that what if anything did you notice?

A. There was a little powder on my gloves and finger.

437 Q. Yellow powder on your gloves and finger?

A. Powder, more like flour.

438 Q. And did you notice where that yellow powder or flour like substance came from?

A. Not particular. I presume it came out of that cylinder. It did not come out of the wire.

439 Q. Did you ever speak to John about the powder coming out of the cap?

A. After I got him home from the hospital I did; never said a word to him before the accident.



440 Q. But after he got out of the hospital was the first time you ever mentioned it to him, the fact of the yellow powder that came out of the cap?

A. Yes.

441 Q. Did you tell it to other people about that time?

A. Yes, I talked about it to everyone.

442 Q. Who did you tell it to?

A. Everybody that was around there I guess.

443 Q. Who all was down around there?

A. That is hard to tell. There was a good many people comes there.

444 Q. You testified that you cut one piece off with the hammer and the other piece you hung in the gantry shed?

A. Yes.

445 Q. Where was the shanty situated at that time with reference to the gantry?

123 A. The crane was situated pretty near in front of it.

446 Q. Of the shanty?

A. Yes, sir.

447 Q. How far did you have to step or go between that and the shanty—

A. Seven or eight steps was all. Just across the rail in the shanty.

448 Q. Just across from the gantry?

A. Yes.

449 Q. One piece you fastened, you and Mr. Berg wrapped on the cable or on the cloth?

A. We did.

450 Q. Then after that was made what if anything did you do, did you afterwards get the piece of wire?

A. I went and got the piece afterwards, after we had stretched the cable up in the air.

451 Q. Did you cut the piece off?

A. I did.

452 Q. And when you cut that piece off, and when you cut the first piece off, how much did you leave if any attached to the cap, that *us if* the wire?

A. Not very much. It was cut to about four or five inches.

453 Q. You left four or five inches?

A. Not over that.

454 Q. Two strands of about that length (indicating)?

A. Yes.

455 Q. After you cut both strands off?

A. Probably four or five inches left.

456 Q. What if anything did you do with the cap and the wire that was attached to the cap?

124 A. I started down w-ere we were working, where Turner was working, where the cable was, and I had the wire in one hand and the cap by the end. I was going to push the cap in the crack. There was a crack in the car.

457. Mr. Yeiser: I move that the answer be stricken as to what he intended to do with it, or push it in something as not responsive, and not binding on the plaintiff.

The motion is sustained.

To which the defendant excepts.

458 Q. Continue your answer.

A. John was there and I gave it to him. He reached over and took it.

459 Q. He reached over and took the cap with the remaining wire on it?

A. Yes, sir.

460 Q. Now, Mr. O'Hara before you gave this cap to John what if any investigation, inspection or test did you make of the cap?

A. Not any. Wire was what I was after.

461 Mr. Travis: I move to strike out the last sentence as not responsive.

The motion is sustained.

To which the defendant excepts.

462 Q. Did you know what the cap was, Mr. O'Hara?

A. I did not.

463 Q. Did you take any steps to inquire of your superiors or any one else as to what the cap was?

A. No.

464 Q. Or make any investigation, or inspection or test of any kind? or attempt so to do?

125 A. No, sir.

465 Q. Now then did you make any remark about the cap looking like anything in particular at the time you handed it to John?

A. I said it looked like a fire cracker.

466 Q. Do you know whether or not he heard your remark?

A. I do not know whether he did or not.

467 Q. Was there any noise there?

A. Yes, there was lots of noise made.

468 Q. Was there any other remark of any kind made to John at the time the cap was passed over to him by you?

A. Not by me there was not.

469 Q. Did you hear anybody else make a remark to him about it?

A. I did not.

470 Q. Now Mr. O'Hara you testified that you cut off the second piece of wire with the hammer?

A. I did.

471 Q. That was true also of the first piece?

A. Yes, sir.

472 Q. Where were you when you cut the second piece of wire from the cap?

A. I was standing right at the end of the leg of the crane.

473 Q. What if anything did you do with the hammer?

A. With the hammer?

474 Q. Yes?

A. I let it drop from the rail where I was using it.

475 Q. And then you went where?

A. I started down to the other end of the car about—I do not know—probably twenty feet down there from where I was. I met John about half way.

126 476 Q. And where did John go? After you had given him the cap?

A. He took one or two steps ahead of me and sat down on the rail. It would put him about the center of the leg of the crane.

477 Q. How far from the hammer?

A. Ten or twelve feet anyway.

478 Q. I will ask you whether or not—what did you do after you gave the cap to John?

A. I went right on down to the end of the crane where Turner was screwing the U bolts. I reached out with my right hand and had hold of the cable, and was holding it, squeezing into the corner of the car, and tried to hold it out so he could tighten it. I stood there a minute, or a minute and a half when I heard the explosion. In fact I saw the flash and heard it both. I heard John scream.

479 Q. How far were you at that time from the place where John was seated?

A. Not over five feet.

480 Q. After the explosion did you turn around, or direct your attention towards the place where it came from?

A. I certainly did.

481 Q. Did you see John at that time?

A. Yes, I caught him, kept him from falling. He had both hands up in front of his eyes.

482 Q. Was he in the same location as he was when you saw him?

A. He was staggering backwards.

483 Q. As far as the distance from the hammer is concerned?

A. Yes, he had not got that far up the track.

484 Q. You heard the explosion?

A. Sure.

127 485 Q. Were you facing towards the explosion?

A. No, I had my back to it, back and side.

486 Q. Did any of these explosives hit you?

A. No.

487 Q. I do not know whether you testified to this point or not. I will ask you at this time whether or not before you got the wire anything was said by you to the foreman as to your knowledge of where wire could be procured?

A. I said we could find something some place.

488 Q. Did you say anything to him about having seen some wire in the coal car that morning?

A. I do not know as I said it to him particular. I spoke up and said I think I will find a piece in the coal car that we transferred, that there was some in there.

489 Q. Was it loud enough, and was he in such a position he could have heard it?

A. I would not swear that he was.

490 Q. How far was he from you at that time?

A. We were all standing there close, working around the cable.

491 Q. Mr. O'Hara, had you ever seen a cap similar to that before the 13th day of September, 1919?

A. I had not.

492 Q. Did you know what it was? at that time?

A. No.

493 Q. I wish you would step down here now and examine the wire on the cloth, and the cloth, and state whether or not that is the same wire and the same cloth that was being used on the job for the purpose you have stated? (Witness looking at Exhibit 1.)

128 A. I could not say as to that. It looks like it. I suppose it is the same. It looks very much like it.

494 Q. Can you identify the cloth?

A. No. I used a piece on one. I was not there when they put the other one on.

495 Q. This hammer you say you used to cut the wire off with, what kind of hammer was it?

A. Claw hammer.

496 Q. And what kind of a head did it have?

A. It was a hammer.

497 Q. The ordinary round-headed hammer?

A. Yes, sir.

498 Q. Was it old or new?

A. I think it was a new hammer. We had some new ones there.

499 Q. How many cloths were put on the cable if you remember at the time the accident occurred?

A. We had that one on.

500 Q. And there was one yet to be put on?

A. Yes, sir.

501 Q. When if you know was that put on?

A. I do not know.

502 Q. Was it put on by you?

A. No, it was put on when I went to use the cable on Monday.

503 Q. It was on when you went to use the cable Monday?

A. Yes, sir.

504 Q. At the time of the accident there was one cloth yet to be put on the cable?

A. Yes, sir.

505 Q. I wish you would step down and examine that piece of rail and direct your attention to the dent appearing on the rail. (Witness leaving stand and going over to the section of rail, Exhibit 2.)

A. Here it is.

506 Q. I will ask you whether you remember that dent on that rail?

A. Yes, there was quite a dent.

507 Q. How long was the rail used on the gantry after the explosion?

A. I came there the first of April and they were still using it there.

508 Q. Is that dent in that rail now as pronounced as it was when you first saw it?

A. No. I could pretty near put my little finger in it when I first saw it. Them wheels probably run over it a good many hundred thousand times.

509 Q. It was a portion of the rail where the gantry ran on?

A. I guess it was. There was a mark on it anyway.

510 Q. I now hand you the photograph marked Exhibit 5, I will ask you whether or not that is a fair likeness of the gantry and surroundings? (Handing the witness Exhibit 5.)

A. Yes, sir, it is.

511 Q. There are different cars there now?

A. Yes, sir.

512 Q. Can you indicate on that gantry about the position that John was sitting at the time of the injury?

A. He was sitting on the east of that chain that hangs in the center of it.

513 Q. East of the chain hanging in the center of it?

A. Yes, sir.

514 Q. Indicate where the chain is?

130 A. Right in the center of the crane.

515 Q. Right in there (counsel indicating)?

A. Yes, sir.

516 Q. Will you take my pencil and put a X mark just below, or at the point?

A. I cannot tell east from west. On photographs I always was confused as to that. (Witness placing a cross mark about under the chain on margin of the exhibit 5.)

517 Q. And the chain you refer to now is about one inch above the cross mark which you placed at the bottom of the photograph?

A. Yes, sir.

518 Q. Do you know what the practice was down there as to the men wearing gloves or otherwise?

A. They all wore gloves.

519 Q. Do you know whether or not John was wearing gloves at the time of this accident?

A. He was. I took them off after he got hurt.

520 Q. And what kind of gloves did he have on?

A. He had on a pair of new leather gloves.

521 Q. How long had you known John?

A. All his life.

522 Q. What was the condition of his health in general before that accident occurred?

A. Good as far as I know.

523 Q. And his eyes?

A. They were all right.

131 Cross-examination.

Questions by Mr. C. A. Magaw:

524 Q. Where do you live?

A. In Council Bluffs, Iowa.

525 Q. How long have you lived there?

A. A little over four years.

526 Q. Where was John O'Hara living at the time of the accident in question?

527 Mr. Yeiser: Objected to by the plaintiff as not proper cross-examination, and further it is immaterial, and incompetent.

The objection is overruled.

To which the plaintiff excepts.

A. In Council Bluffs.

528 Q. How long had he been living there?

A. At that time?

529 Q. Yes?

A. I do not know. 11 or 12 years I guess.

530 Q. Does he still live there?

A. Yes, he does.

531 Q. This accident occurred in Council Bluffs, Iowa, did it not?

532 Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and not proper cross-examination, and not within the issues of this case.

The objection is overruled.

To which the plaintiff excepts.

A. Yes, sir.

533 Q. Did the accident occur in Council Bluffs, Iowa?

A. Yes, sir.

534 Q. How long had you been employed at this gantry crane prior to the accident?

132 A. I do not know exactly, 17 or 18 months, something like that.

535 Q. You went to work there at the gantry before John and your son Francis came to work there, did you?

A. Yes, sir.

536 Q. And are you still employed there?

A. I am not.

537 Q. Are you working for the Union Pacific at this time?

A. No.

538 Q. What are you doing now?

A. Working at the Burlington.

539 Q. Will you please tell the jury what you did with this wire after you got it out of the coal car with respect to twisting or pulling one of the strands loose from the cap?

A. I had the cap in the left hand and I tried to pull the wire

out. I jerked on it two or three times and it did not come, and I tried to twist it off. It was not heavy. I thought it would twist but it did not twist. It was too tough. I had it across the rail like that and hit it with the hammer and cut it off, and I took one part of it, the part that had the cylinder on and I hung it up in our shanty because I was going to use it later, and took the piece that was in my hands, and took it and wrapped it around the cable.

540 Q. That tied on one cloth?

A. Yes, sir.

541 Q. Then you had another cloth to put on the cable, did you?

A. Yes, sir, we had a cloth to put on the other end of the cable later.

542 Q. Which would be two cloths altogether?

A. Yes, sir.

543 Q. After you had tied the one cloth on did you go  
133 back to the shanty and get the other strand of wire that you hung up?

A. I did later.

544 Q. That is after you had that one cloth on?

A. Yes, sir.

545 Q. What did you do with the strand at that time?

A. The second one?

546 Q. Yes?

A. After the explosion I dropped it.

547 Q. I mean before the explosion?

A. I was standing down there waiting for them to get the bolts tight, and had the wire in my hand.

548 Q. Was the cap attached to the strand?

A. No. John had the cap at that time.

549 Q. Going back a little further; as I understand you first cut off one strand and hung the other strand with the cap still attached to it in the shanty?

A. Yes, sir.

550 Q. The shanty is what you called the tool house?

A. Yes, sir.

551 Q. And then you had the strand on there that you later cut off to wrap on another cloth?

A. Yes, sir.

552 Q. Is that right?

A. Yes, sir.

553. Q. Now then what was the next thing you did after that?

A. I guess then we put that cable on the hoist and raised it up in the air and put the other end to the coupler of the car and took the slack out of it, and Turner came down out of the cab and had  
134 the wrench and was tightening the U bolts, and I was standing there with the wire.

554 Q. Had you cut the cap off of it at that time?

A. Yes, sir.

555 Q. When?

A. Just shortly before that.

556 Q. Took it out of the shanty and—did you -ry to twist that off?

A. No, I did not.

557 Q. What were you going to do with the cap when you cut it off, did you have any use for that?

558 Mr. Yeiser: Objected to by the plaintiff as being immaterial, and not binding on the plaintiff, and not proper cross-examination

The objection is overruled.

To which the plaintiff excepts.

A. No, I hadn't any use for it.

559 Q. What did you intend to do with it?

560 Mr. Yeiser: Objected to by the plaintiff as being immaterial and further it is not proper cross-examination of this witness.

The objection is sustained.

To which the defendant excepts.

561 Q. What were you going to do with the cap after you cut it off?

A. What?

562 Q. What were you doing with the cap after you cut it off?

A. I was going to put the cap back in the car.

563 Mr. Yeiser: I move to strike the answer out as not responsive.

The motion is sustained.

To which the defendant excepts.

564 Q. What were you in the act of doing with the cap after you cut it off and before John took it?

135 A. I had it in my hand.

565 Q. For what purpose did you have it in your hand?

566 Mr. Yeiser: Objected to by the plaintiff as being immaterial and incompetent, and not proper cross-examination

The objection is overruled.

To which the plaintiff excepts.

A. Why, I just had that cut off, of course, is the reason I had it in my hand.

567 Q. What did you do with it?

A. I gave it to John.

568 Q. How did you happen to take it back to John?

A. I don't know. He reached over and took it, I guess. At least I gave it to him.

569 Q. Did you give it to him or did he reach over and take it?

A. Well, kind of both I guess. When he reached I handed it to him.

570 Q. Did he say anything to you?

A. He wanted to know what it was. He said, what is that. I says, I don't know, it looks like a fire cracker.



571 Q. Is that all that was said?

A. That is all.

572 Q. Did you say that at the time he reached over and took it?

A. I said that.

573 Q. He asked you what it was?

A. Yes, he asked what it was right there before you?

A. Yes, sir.

574 Q. And you replied that you did not know, but it looked like a fire cracker?

A. Yes, sir.

575 Q. Is that right?

A. Yes, sir.

136 576 Q. Did you pay any more attention to John at that time?

A. Not a bit, any more than he walked over and sat down on the rail and I went on with my work.

577 Q. How long after that did you hear the explosion?

A. It was mighty soon after that. It was over a minute; possibly two minutes.

578 Q. Did you know what this was at the time you gave it to him?

A. I would not give it to him if I had.

579 Q. You did not know then what it was?

A. No, I did not know.

580 Q. Had you ever seen one of them before?

A. I never had.

581 Q. You had all of the wire that you needed to tie that other cloth on at that time, did you not?

582 Mr. Yeiser: Objected to by the plaintiff as calling for the conclusion of the witness, and not proper cross-examination.

The objection is overruled.

To which the plaintiff excepts.

A. I do not know whether I had all I needed. I had about all there was.

583 Q. You had the two strands of wire that were the same length—they were the same length?

A. We would have to make what we had do.

584 Q. You had cut off all there was. That is all you had, was it not?

A. I cut off the most of it anyhow.

585 Q. Were the two strands of wire that were on the cap about the same length?

A. Yes, any more than the one I twisted, I guess was twisted up some and made it a little longer than the other one. If you  
137 take these two strands off you can measure them and show how much was left on that one.

586 Q. When was the first time you discovered this cap, Mr O'Hara?

A. It was in the forenoon while we were transferring it. It came

up around my feet a time or two, and I kicked it off in the corner of the car.

587 Q. That was the wire?

A. Yes, sir.

588 Q. Did you know there was a cap on it at that time?

A. Not until I got it.

589 Q. That is the first time you knew there was a cap on the wire?

A. Yes, sir.

590 Q. Did you say anything to anybody about that cap at that time?

A. No, as soon as I got out of the car with it, or pretty soon, I cut one piece off and used it. We were ready for the wire when I went after it.

591 Q. You had not said anything to anybody about it?

A. Not a word.

592 Q. And the only other person that knew about it as far as you know was John when he saw you with it and asked you for it?

A. Turner knew I had it.

593 Q. What?

A. Turner knew I had it because he saw me hold it up.

594 Q. He knew you had the wire?

A. Yes.

595 Q. You do not know whether he saw the cap?

A. No, I would not say as to that. It would have been very easy to overlook. It was not very large.

596 Q. The only two people that ever talked about the cap were you and John?

137½ A. That is all.

597 Q. The plaintiff?

A. Yes, sir.

598 Q. Where were you standing when John asked you what you had, or what it was?

A. I was about half way the length—about in the middle of this car that we transferred. Close in the middle of the car.

599 Q. What was John doing at that time?

A. I do not know what he was doing. He had just come down from the end of the car. From the east end of the car. I do not know whether he was working there or not.

600 Q. State whether or not you intended to, and were about to throw the cap away, and back into the car at the time John asked you what you had?

601 Q. Mr. Yeiser: Objected to by the defendant as being incompetent, irrelevant and immaterial.

The objection is sustained.

To which the defendant excepts.

602 Q. State whether or not you would have given this cap to John if he had not asked you what you had?

603 Mr. Yeiser: Objected to by the plaintiff as being immaterial and not proper cross-examination and asking for a conclusion of the witness, and speculative.

The objection is sustained.

To which the defendant excepts.

604 Q. What was your purpose in letting John take the cap from you?

605 Mr. Yeiser: Objected to by the plaintiff as being immaterial and not proper cross-examination and calling for the conclusion of the witness, and not binding upon this plaintiff and further it is speculative.

138 The objection is overruled.

To which the plaintiff excepts.

A. I had no purpose. I would give it to anybody that would ask for it.

Redirect examination.

Questions by Mr. J. C. Travis:

606 Q. What kind of a day was it as to sunshine or otherwise?

A. It had been a little showery in the forenoon but did not rain. There was a shower, and turned off hot and sultry, and turned in hot again.

607 Q. Was the sun shining?

A. It was at the time.

608 Q. In cutting the wire—the second wire from the cap, did you hold your hand over one end, or how did you hold the wire with the cap in your hand?

—A. I had the cap in my hand, and wire both, in my hand.

609 Q. Similar to that? (indicating).

A. I had a longer hold.

610 Q. You had hold of the end of the wire?

A. Let me have it.

(Handing same to witness.)

A. That is the way (indicating).

611 Q. You held both so when you cut them with the hammer it was neither end—neither the cap or wire dropped?

A. No.

612 Q. In cutting it did you lay the cap on top of the rail? flat?

A. I had the cap in my hand.

139 613 Q. The cap was in your hand?

A. Yes, sir.

Witness excused.

140 C. P. BEISTLE, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. J. C. Travis:

614 Q. State your name.

A. C. P. Beistle.

615 Q. What is your position with the government, if any?

A. I have no position with the government.

616 Q. What connection have you with the Bureau of Explosives?

A. Chief Chemist.

617 Q. And what is the Bureau of Explosives?

A. The Bureau of Explosives is an organization to promote the safe transportation of explosives and other dangerous articles.

618 Q. How long have you been connected with it as chief chemist?

A. 15 years, chemist and chief chemist.

619 Q. Were you connected with the railroad companies, as a railroad official?

A. No, the bureau of explosives is a voluntary association of transportation companies and manufacturers.

620 Q. You are familiar with the publication of the various government bulletins on explosives?

A. I have seen some of them.

621 Q. Do you know Charles S. Munroe and Clarence Hall?

A. I know them, yes, sir.

622 Q. And they are authorities on——

A. I think Munroe is with the Bureau of Mines at the present time.

623 Q. Is he regarded an authority upon this subject?

A. He is an expert on explosives.

624 Q. Calling your attention now to the Bulletin No. 80 that I hand you, and entitled Department of Interior, Bureau of Mines, Joseph A. Holms, Director, and it is entitled, "A primer on explosives for metal miners and quarrymen," and published by the Washington Government Printing Office, in the year 1915, are you familiar with that publication?

141

(Handing same to the witness.)

A. I have seen it, yes, sir.

625 Q. Is that regarded as an authority?

A. Well, it is a book of directions given in a general manner covering the handling of explosives and contains cautions for handling explosives.

626 Q. Is this regarded as a scientific publication upon that subject that it deals with?

A. I would not exactly say that, no. It is a popular—it is more of a primer on explosives, and it is meant for the—it is a popular book. It is not a scientific treatise.

627 Q. It is generally scientific, but yet as a primer; it is on the science of explosives?

A. No, I would not say that, it is on the practical use of explosives.

628 Q. But it is one of the first or earliest publications on this subject?

A. One of the first——

629 Q. It is not a final publication, but it is as the word indicates, a primer, is it not?

A. That is the title of it.

630 Q. And published by the Government?

A. So it says.

631 Q. For the use——

A. It is for the use of miners and quarrymen. That is what it says.

142 632 Q. And do you know of any better primer than this book that I have called your attention to?

633. Mr. Magraw: Objected to by the defendant as being incompetent, irrelevant and immaterial and further it is argumentative.

The objection is overruled.

To which the defendant excepts.

A. I am not in the habit of instructing these men. It is not my duty to instruct the quarrymen and miners. I have not looked it up to know what other literature there may be if any.

634 Q. This book is an authority on the questions treated in it, is it not?

A. I do not know what you mean by authority.

635 Q. You testified in the previous case for the defendant, did you not?

A. Yes, sir.

636 Q. And on cross-examination did I not hand you this book and ask you whether or not it was an authority on that subject, and you said it was?

637. Mr. Magaw: Objected to by the defendant as being incompetent and further it is cross-examination of his own witness.

The objection is overruled.

To which the defendant excepts.

A. I do not recall every detail and every question put to me two years ago.

638 Q. You are familiar with it as one of the government publications by the men that you have described, and which is issued for the use of the public along the lines mentioned?

A. It is such a publication, certainly.

639 Q. And contains instructions and cautions?

A. Yes, sir.

143 640 Q. State whether or not the Exhibit 3 that I hand you is a detonator, or a blasting cap? (Handing the witness Exhibit 3.)

A. It is not either.

641 Q. What is it?

A. It is a——

Question is withdrawn.

642. Mr. Yeiser: The plaintiff now offers in evidence certain portions of this Government Bulletin No. 80 just identified by the witness, as follows:

From page 35: offering the last two lines on page 35, the first four lines on page 36 to the period in said fourth line; the last 8 lines on page 39 and the first 14 lines on page 40. All to be known as Exhibit 6.

There being no objection same is received in evidence and is read to the jury, and a true and correct copy here follows:

144      **Exhibit 6 to Testimony of C. P. Beistle.**

643. From Pgs. 35, 36, 39, and 40 of Govt. Bulletin No. 80.

**Detonators.**

Detonators, which are also called blasting caps, or sometimes, in mining coal, exploders, consist of copper capsules of about the diameter of an ordinary lead pencil that are commonly charged with dry mercury fulminate or with a mixture of dry mercury fulminate and potassium chlorate, the charge being so compressed in the bottom of the capsule as to fill it to about one-third its length.  
(Pg. 39:)

In the description of mercury fulminate attention was called to its extreme sensitiveness to heat, friction, or blows, and to the extreme violence of its explosion. All these properties therefore belong to detonators and electric detonators, and these devices should be treated with the utmost respect. Never attempt to pick out any of the composition. Do not drop them or strike them violently against any hard body. Do not lay them on the ground where they may be stepped on. Do not step on them. In crimping, take the greatest care not to squeeze the composition and never crimp with the teeth, for there is enough composition in one of these small capsules to blow a man's head open.

**Storage and Transportation of Detonators.**

Detonators should be stored in a dry place and in a building apart from any other explosives. They should never be carried into a mine with other explosives and they should never be placed in a mine near other explosives except in bore holes. When carried or shipped, they should be packed firmly with a quantity of elastic material, such as felt or the coiled legs of the electric detonators, about them, and they should not be exposed to heat, blows, or shocks of any kind. Plate IX, A, shows a new type of container for detonators. The device prevents the detonators

from coming in contact with one another or with the metal of the container.

146 644 Q. Is Exhibit 3 an electric detonator?

A. It is a dummy electric blasting cap or detonator.

645 Q. In other words all that needs in it is the explosive in it?

A. I presume that the bridge and the plugs inside of the cap are there. I only see the two wires. If it had the other parts intact it would be—

646 Q. The other wires would reach to the end?

A. The wires would reach to the middle about, to the upper surface of the fulminate.

#### Cross-examination.

#### Questions by Mr. Charles A. Magaw:

647 Q. What kinds of detonators are there?

A. There are the ordinary blasting caps, electric blasting caps like this, or just plain blasting caps, and then of course there are detonators that are used for shells and military projectiles of various kinds that are different.

648 Q. There are two kinds of blasting caps, one is called the electric blasting cap such an Exhibit 3, which you hold in your hand, and you refer to the other as the ordinary blasting cap?

A. Yes, sir.

649 Q. Will you describe the difference between the ordinary blasting cap and the electric blasting cap?

A. The ordinary blasting cap consists of these small—a copper tube closed at one end and open at the other end, and about half the space inside of this copper tube is filled with compressed fulminate of mercury, or mixture of fulminate of mercury and a little chlorate of potash, and the other end of the tube above the

147 surface of the fulminate is entirely empty, and the end is open. That is called a blasting cap or detonator, with this device—the copper capsule and the compressed fulminate are at the lower end of the ordinary blasting cap. Then above the compressed fulminate in this part, in the electric cap there is a small quantity of loose, powder fulminate, and then the electric igniting device goes down into this loose fulminate of mercury, or sometimes a little gun cotton. The immediately above this fuse there is a plug of asphaltum or pitch through which the wires pass, and above that still is sulphur. The sulphur is poured in in a melted condition and that insulates the end of the electric blasting cap so that it keeps out dampness—

650. Mr. Yeiser: The plaintiff objects to this as not responsive.

The Court: Objection is overruled.

To which the plaintiff excepts.

A. The purpose of this sulphur is to seal the cap and keep out the moisture and foreign material and also to hold the wires firm in

position so they cannot be pulled out easily, and it keeps the cap in good condition for future use.

651 Q. In the electric blasting cap is there a hole in the opposite end from the end of the wires such as is in the dummy?

A. No, it is closed.

652 Q. In the electric blasting cap is the explosive charge exposed to the surface at any point?

A. No, it is not.

653 Q. It is protected at one end by the shell, and at the other end by the plug and sulphur filling to which you have just referred?

A. Yes, sir.

654 Q. Do they crimp the electric blasting cap?

148 A. No, you don't crimp it. The crimping process that the bulletin spoke about is for the ordinary blasting cap which it used with the fuse.

655 Q. How is that used?

A. What they call a safety fuse—It is inserted in the open end of the ordinary blasting cap and then the open end of it is crimped—pressed together so that it squeezes the fuse, so that the cap will not slide off of the fuse.

656 Q. In the ordinary blasting cap—

657. Mr. Travis: I object to the question as to the ordinary blasting cap. The inquiry was simply made as to this being an ordinary detonator, and further it is not proper cross-examination.

658. Mr. Magaw: The witness is entitled to explain the difference between them.

The Court: On the theory of testing his knowledge he ought to be allowed to answer the question. The objection is overruled. To which the plaintiff excepts.

659 Q. In the blasting cap that is used with a fuse, the one that you referred to as being open at one end, referring to that—the charge—the explosive charge is exposed at one end of the shell, is it?

A. The explosive charge is not shut off. It reaches about half way to the top of the shell and it is not protected except by the side walls. It is not covered over.

660 Q. The shell is open at one end?

A. Yes.

661 Q. And the blasting charge fills the shell about half full?

A. Yes, sir.

662 Q. Is there any plug or any covering to protect the blasting—the explosive charge of the shell?

A. Not in the ordinary blasting cap.

663 Q. What is this explosive?

664. Mr. Yeiser: Objected to by the plaintiff as not proper cross-examination.

The objection is overruled.

To which the plaintiff excepts.



A. Principally fulminate of mercury.

665 Q. What will explode fulminate of mercury?

666. Mr. Yeiser: Objected to by the plaintiff as not proper cross-examination.

The objection is overruled.

To which the plaintiff excepts.

A. Friction, impact, fire, or heat may set off fulminate of mercury.

667 Q. Do you know at what temperature—what temperature of heat it requires to explode one?

668. Mr. Yeiser: Objected to by the plaintiff as not proper cross-examination.

The objection is overruled.

To which the plaintiff excepts.

A. The lowest temperature that I have seen fulminate of mercury explode at is 135 degrees centigrade, that is 35 degrees centigrade above temperature of boiling and it has to be held at that temperature for say 25 or 30 minutes is my recollection.

669 Q. Do you know what it is Fa-renheit?

A. I cannot tell you that off hand. I can figure it out.

670 Q. Water boils at 212 Fa-renheit?

A. Let'- see, I think it would be 257 degrees Fa-renheit. That is a rough calculation.

150 671 Q. Would it explode at a temperature lower than 257 degrees Fa-renheit?

A. I have never been able to explode it at that temperature. By heating fulminate of mercury to the temperature of boiling water the fulminate was destroyed so that it would not explode any more, it changed it to something else, or I was unable to cause it to explode at that temperature.

672 Q. Will it explode from a concussion or blow?

A. If there is sufficient of a blow, yes.

673 Q. What are these electric blasting caps used for?

A. Electric blasting caps are used in exploding dynamite principally, and blasting and mining.

674 Q. Are they used commercially?

A. Yes.

675 Q. What experience have you had in handling electric blasting caps?

A. Well, I have handled them for 20 years, shooting charges of high explosives and testing blasting caps and also testing high explosives. I have taken them apart and analyzed them.

676 Q. Have you seen men using them in practical work?

677. Mr. Yeiser: Objected to by the plaintiff as not proper cross-examination.

The objection is sustained.

To which the defendant excepts.

Witness excused.

151 678. Mr. Yeiser: The plaintiff offers in evidence so much of the Carlisle Tables of Life Expectancy of a boy of the age of 18 years, good health, the said table showing that said expectancy is 42.87 years. And we offer that in evidence.

There being no objection same is received and read to the jury as above stated.

152 J. C. TRAVIS, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. John O. Yeiser:

679 Q. State your name?

A. J. C. Travis.

680 Q. Were you connected with the Army during our war with Germany?

A. Yes, sir.

681 Q. And what official position did you hold?

A. First Lieutenant of Infantry and Instructor in Chemical Warfare.

682 Q. At what place?

A. 40th Infantry at Ft. Sheridan, Illinois, and Camp Custer Michigan. With the Chemical Warfare, I was at Camp Humphreys, Virginia and Camp Kendrick New Jersey and at Camp Custer, Michigan.

683 Q. As such instructor were you issued a book that I am handing to you entitled Grenade Training Manual Edited by the Army War College in January, 1918, which I now hand you? (Handing the witness said manual.)

A. That book was furnished me as a first lieutenant of infantry.

684 Q. By whom?

A. By the adjutant of the 40th Infantry at Fort Sheridan Illinois.

685 Q. And for what purpose was the book handed to you, Mr. Travis?

A. It was handed to me for my personal instruction and guidance and for the instruction and guidance of the troops under my command.

686 Mr. Yeiser: The plaintiff offers in evidence the following portion of this Grenade Training Manual, just identified, beginning on page 18 with the words "Special Precautions to take in handling detonators, and offering the balance on that page and all on page 19, comprising 10 paragraphs in all, and marked Exhibit 7.

153 Cross-examination.

By Mr. Magaw:

687 Q. You are one of the attorneys for the plaintiff?

A. Yes, sir.

## Redirect examination.

## Questions by Mr. Yeiser:

688 Q. You had arranged to have Mr. Hopkind here?

A. He promised to be here at 9:30 this morning and he disappointed me.

689 Q. And on that account you are supplying this testimony, are you?

A. Yes, sir.

690. Mr. Magaw: The defendant objects to the offer of this book, Exhibit 7 for the reason that it is incompetent, irrelevant and immaterial, and no foundation is laid.

## By Mr. Yeiser:

691 Q. Mr. Travis, are you still connected with the Army?

A. I am.

692 Q. In the same capacity?

A. No, sir. I am still a First Lieutenant, but I am now connected with the Chemical Warfare Service as reserve officer attached to the staff of the 89th Division.

693 Q. Is this book and are the pages referred to—are they still in force, and is this recognized as the standard authority upon that branch of the science of war?

A. It is a standard authority upon that branch of the science of war.

694 Q. And explosives?

A. Yes, sir.

154 Mr. Yeiser: We renew the offer of Exhibit 7.

695. Mr. Magaw: Objected to by the defendant for the reason that it is incompetent, irrelevant and immaterial, and no sufficient foundation is laid.

## By Mr. Yeiser:

696 Q. The instructions referred to, Mr. Travis, may I ask you whether or not that refers to both the electric and fuse detonators?

697. Mr. Magaw: Objected to by the defendant as not the best evidence, and further it is incompetent, and no foundation is laid.

The objection is sustained.

To which the plaintiff excepts.

698. Mr. Yeiser: I will offer in addition to that offer the title page and also the two following pages that show the authority contained in that book itself.

699. Mr. Magaw: Objected to by the defendant for the reason that it is incompetent, irrelevant and immaterial, and no sufficient foundation is laid, and not competent independent documentary evidence.

700. The Court: I will with-hold ruling on Exhibit 7.

Witness excused.

701. The plaintiff rests.

155 702. Mr. Magaw: The defendant now renews the motion made at the beginning of this trial. The defendant objects to any further proceedings herein for the reason and upon the ground that the evidence in this case discloses that the plaintiff was not a resident of Douglas County, state of Nebraska when he sustained the injuries upon which he bases this action, and because his right of action or alleged cause of action did not arise in Douglas County, Nebraska, in which county and state this suit was brought; and for the further reason that the evidence shows that the plaintiff was at the time he sustained said injuries a citizen and a resident of Council Bluffs, Pottawattamie County, state of Iowa at the time of the accrual of the alleged cause of action, and because the evidence shows that the alleged cause of action arose in Pottawattamie County, Iowa, and that for that reason this court was without jurisdiction because the action is not brought in the county or district where the plaintiff resided at the time of the accrual of his alleged cause of action, or in the county or district where the alleged cause of action arose, as required by General Orders No. 50-A, No. 18-A and No. 18-B of the Director General of Railroads; and the defendant further objects to being required to produce evidence herein for the reason that the evidence produced by the plaintiff is not sufficient to sustain a verdict or judgment in *in* the plaintiff's favor under the *usses* joined in this action.

The defendant's motion and objection are overruled.

To which the defendant excepts.

703. Thereupon the defendant by way of defense presented the following evidence:

156 JOHN E. TURNER, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

704 Q. State your name.

A. John E. Turner.

705 Q. Where do you live?

A. At Council Bluffs, Iowa.

706 Q. How long have you lived there?

A. Well, I lived there since 1907.

707 Q. What is your occupation at this time?

A. Crane operator.

708 Q. For what railroad?

A. The Union Pacific.

709 Q. Where?

A. Council Bluffs.

710 Q. Iowa?

A. Yes, sir.

711 Q. And were you operator of that crane on September 13, 1919?

A. Yes, sir.

712 Q. And were you working for the Director General of Railroads at that time?

A. Yes, sir.

713 Q. Were you the foreman of the gang of men who were working there?

A. Yes, sir.

714 Q. Who were the members of your crew?

A. There was Charlie Berg, and Ed. O'Hara and Francis O'Hara and John O'Hara.

715 Q. When did you commence operating this crane in Council Bluffs, Iowa?

157 A. Well, the first time I started it was in the fall of 1908.

716 Q. How long did you work with this?

A. I worked up until I believe it was 1916.

717 Q. When did you commence work again after that?

A. I started the 16th day of January, 1919.

718 Q. January 16, 1919?

A. Yes, sir.

719 Q. And have you been operating it since?

A. Yes, sir.

720 Q. And during the period of Federal control you operated it for the Railroad Administration?

A. Yes, sir.

721 Q. Just the same as you did before and since for the Union Pacific Railroad?

A. Yes, sir.

722 Q. Do you remember the day that John O'Hara suffered the injury to his eyes?

A. Yes, sir.

723 Q. Were you there at that time?

A. Yes, sir.

724 Q. What had you been doing that day prior to the accident?

A. We had transferred a load of sheet steel in the forenoon.

725 Q. Before the accident?

A. Yes.

726 Q. Did you use this gantry in doing that?

A. Yes, sir.

727 Q. What did you use to fasten your load to the crane so that it could be transferred from one car to another?

158 A. We used chains on the sheet iron—sheet steel to make that transfer.

728 Q. Did you have a chain there on the 13th of September, 1919?

A. Yes, sir.

729 Q. The day of the accident?

A. Yes, sir.

730 Q. Did you have more than one chain?

A. Yes.

731 Q. Did you have any other appliances to use in place of the chain?

A. Why, we had ropes there to use.

732 Q. How many feet of rope did you have? or how many different ropes did you have?

A. Well, I think we got two, and inch and a half rope and two inch rope.

733 Q. Were these there on this 13th day of September, 1919, the day of the accident?

A. Yes, sir.

734 Q. Did you on September 13th, 1919, the day of the accident have the usual and ordinary equipment that went with the gantry?

A. Yes, sir.

735 Q. You had the usual number of chains?

A. Yes, sir.

736 Q. And the usual number of ropes?

A. Yes, sir.

737 Q. And had you used these chains and ropes prior to the day of the accident?

A. Yes, sir.

738 Q. And used them in transferring lumber, had you?

A. Yes, sir.

159 739 Q. Poles?

A. Yes, sir.

740 Q. So on the day of the accident this crane was equipped in the usual and ordinary manner?

741 Mr. Yeiser: Objected to by the plaintiff as leading.

The objection is overruled.

To which the plaintiff excepts.

A. Yes, sir.

742 Q. What time did you go to work on the day of the accident?

A. Eight o'clock in the morning.

743 Q. What was the first thing that you did that day, Mr. Turner?

A. To transfer a load of sheet steel.

744 Q. Had that car been set in under the crane the day before?

A. At the night before.

745 Q. During the night before?

A. Yes, sir.

746 Q. It was there and ready to be unloaded or transferred in the morning?

A. Yes, sir.

747 Q. And how long did it take you to finish transferring that car of steel?

A. I think we got started about eight o'clock and we finished, I believe it was about 10.30 or 11 o'clock.

748 Q. Were there any other cars set so that they could be transferred?

A. No, sir.

749 Q. At that time?

A. No, sir.

750 Q. Was it your duty to set the cars in to transfer, or wait until they had been set under the crane for that purpose?

160 A. Well, it was my duty to notify the yard master if they were not set. If they were put in there on that lead and were not set it was my duty to notify the yard master.

751 Q. After you finished unloading this steel, at that time had you notified the yard master?

A. Yes, sir.

752 Q. What duty did you and the men have to perform between the time you had completed unloading the car of steel that you have referred to and the time when another car would be set there for transfer?

A. Well, we did not have any particular duties to do right at that time. Any time that we got through with a car that had been set, we generally waited until we got another one set.

753 Q. And what did you do after you finished unloading this car of steel? On the day of the accident?

A. Well, after dinner we made a cable sling, that is all we did then during the day.

754 Q. What did you make the sling for?

A. We made it for handling lumber and poles and anything in that line of wood so in case we had a load of wood we would use the cable, and otherwise if it was steel or iron we used a chain.

755 Q. And did you have any cable for such use prior to the time of the accident?

A. Not at this second time that I went there.

756 Q. At the time that you had been working there since January, 1919?

A. Yes, sir.

757 Q. Had anybody told you to make this cable?

161 758. Mr. Yeiser: Objected to by the plaintiff as being immaterial.

The objection is overruled.

To which the plaintiff excepts.

A. No, sir.

759 Q. Now, will you tell the jury what was done there in regard to making this sling. First, what did you make it out of?

A. Well, we had a piece of cable in the tool house that I told some of the boys to *being* that cable out and cut about 30 or 35 feet off of it, and to make a cable we would have to have some cable clamps to make a sling, and it would be much easier to use than a chain in going around double loads of lumber and telephone poles, and anything of that kind in that line, and so they brought the cable out, and I don't know who got it. I went to notify the yard master about setting the next load. We got the cable out and cut it and

put the clamps on and fastened the hoist on and put it around the end of the coal car. We had it fastened to the hook at the top of the crane so you could tighten the nuts on the clamps.

760 Q. Go ahead.

A. Ed O'Hara was standing by my left side, I believe it was. I had the monkey wrench and was tightening the clamps on the cable, the nuts, when I heard the explosion, when the boy was injured.

761 Q. Did you know there was any explosive cap on the premises?

A. No, sir.

762 Q. Had you seen this cap prior to the time that it exploded?

A. No, sir.

763 Q. Did you know that any man had a cap—an explosive cap?

A. No.

764 Q. Had anybody said anything to you about it before the explosion?

162 A. No, sir.

765 Q. Were any explosives used in or about that work there?

A. No, sir, there were not.

766 Q. Do you know anything about explosives?

A. No, sir, I do not.

767 Q. In connection with your work and your duties there did you or do you use any explosives?

A. No, sir.

768 Q. Was this cable permanently attached to the gantry or the crane?

A. Why, the cable that we made the sling from it was in the tool car when I went there the second time.

769 Q. Had it been scrapped?

A. Yes, sir, it had been taken from one of the hoists and put in the tool car.

770 Q. And was out of use entirely; it was not being used at the time when you went to get it?

A. No, it was not in use.

771 Q. After this sling or appliance that you were making, when it was completed was it to be attached to—permanently attached to the gantry, or was it fixed so that it could be taken on and off?

772. Mr. Yeiser: Objected to by the plaintiff as being leading. The objection is overruled.

To which the plaintiff excepts.

A. It was so it could be taken off at any time.

773 Q. Was it to be used the same as you had used the chains and the ropes to which you referred?

A. Yes, sir.

774 Q. In other words it was just a sling by itself?

163 A. Yes, sir.

775 Q. Had you the cable sling completed prior to the time of the accident?



A. No, sir.

776 Q. Had you used it at any time before the accident?

A. No, sir.

777 Q. Do you know when if at any time after the accident you first used it?

A. No, I do not. I do not remember of any time after the accident that we did use the cable.

778 Q. Did you transfer any more cars of material on the day of the accident?

A. No, sir.

779 Q. Were any more cars set in there on that day?

A. No, sir.

780 Q. You remember what day of the week the accident occurred on?

A. I believe it was on a Saturday.

781 Q. Did you transfer any on the next day, that being on Sunday?

A. No, sir.

782 Q. Did you keep a record that time of the cars that you transferred at the gantry?

A. Yes, sir.

783 Q. Have you that record with you?

A. Yes, sir.

784 Q. Is it in your own hand writing?

A. Yes, sir.

785 Q. Is it correct?

A. Yes, sir.

786 Q. Can you refer to that and refresh your recollection and state whether or not any cars were transferred on Sunday, 164 the day following the accident? That would be September 14, 1919?

A. No, on the 14th we did not transfer any. We had five loads set that morning. On the 15th we had nine set.

787 Q. What were those nine cars on the 15th? that were set, what were they loaded with?

A. There was steel, five loads of steel.

788 Q. Did you use this cable in transferring those five loads of steel?

A. No, sir.

789 Q. Did you use it in transferring any of these loads of steel?

A. No, sir.

790 Q. Did you transfer any telegraph poles, or poles of any kind on the 15th?

791. Mr. Yeiser: Objected to by the plaintiff as being immaterial and answered.

The objection is overruled.

To which the plaintiff excepts.

A. We started to transfer a car of poles on the 15th and finished on the 16th.

792 Q. Do you know whether or not you used this cable sling in transferring that car of telegraph poles?

A. No, I do not believe we did. It seems to me as though we used a rope. A chain or rope to make the transfer.

793 Q. Mr. Turner, you heard Mr. Ed O'Hara's testimony—did you hear Mr. Ed O'Hara's testimony about holding up a piece of wire and asking you if that would do, and you saying in substance, it would if there was enough of it; do you remember his saying that?

A. Yes.

794 Q. State whether or not Ed O'Hara held up a piece of wire for your inspection.

165 A. I don't know whether he did or not, I did not see it.

795 Q. Did you have a material car or shanty there on the premises?

A. Yes, sir.

796 Q. Is that the one that he referred to, or some witness as the shanty?

A. Yes, sir.

797 Q. Is it located near the crane or gantry?

A. It sets in the center, in west of the gantry track.

798 Q. Did you have any string or twine in that shanty there at the time?

A. Yes, sir.

799 Q. What was the character of this twine?

A. We had some rope in there that we cut off a strand and unbraided it and made it about the same as binding twine. There was quite a bit of that in the car at that time.

800 Q. Was there any wire in there?

A. There was some wire but it was heavy.

801 Q. Do you recall what directions if any you have in regard to tying cloth on this cable?

A. Well, I asked some of the boys if there was any wire, to get some wire, that there was some of that little rope or twine in the car, that it was all right, and some said the wire was too big. I saw there was an old broom in there, and you can tear the old broom up and use the broom wire, either that or some of this binding twine. That is as far as I know. I do not know where they got the wire, in the shanty or where it came from.

166 Cross-examination.

Questions by Mr. John O. Yeiser:

802 Q. You could not use a gantry at any time very well without some sling, and the only way of attaching it is a big hook, is it not as shown in this photograph (referring to picture).

A. Yes, a big hoist there.

803 Q. And that hook usually must be fastened into a sling of some kind, fastened around the object to be moved?

A. Either sling, or chain, either one.

804 Q. There must be either a sling of rope, or a chain or cable to facilitate work of this kind?

A. Not necessarily a sling, any kind of a chain would do.

805 Q. That is what I mean?

A. Yes, sir.

806 Q. You must have something to put around the object and hook in it?

A. Yes, sir.

807 Q. So that the gantry is not complete for use without that attachment?

A. Not unless we have chains and ropes.

808 Q. You frequently wear out ropes and chains?

A. Yes, sir.

809 Q. When they are worn out, in order to keep it in repair and in working order you must furnish new ones?

A. Yes, sir.

810 Q. And once before you had a cable sling there?

A. Yes, sir. And on some wood objects it is much better to be used than rope or a chain.

811 Q. You had a car of poles just outside of the gantry?

A. Yes, sir.

812 Q. Coming next to the gantry?

167 A. It was supposed to be next.

813 Q. So that this cable was a preparatory act to handling that car of poles and several others as might come?

A. Well, not particularly that one car, anything in the line of lumber.

814 Q. That and others that would follow?

A. Anything in the line of lumber, anything in that way.

815 Q. And the gantry then had been operated many years had it not?

A. Yes, sir.

816 Q. And whenever you run out of oil or anything connected with it you got it and kept it in order?

A. Yes, sir.

817 Q. Now as foreman you did some of the bolting on this cable yourself?

A. Yes, sir.

818 Q. And you knew that these ends of wire when exposed might injure a workman's hands?

A. Yes, sir.

819 Q. So you directed cloth to be put around them?

A. Yes, sir.

820 Q. You wanted something tied on strong?

A. Yes, sir.

821 Q. Did you know where the cloth was?

A. The cloth I believe was in the shanty.

822 Q. What?

A. In the tool house.

823 Q. It was reported to you that the wire was a little too heavy that was in there?

A. Yes, sir.

824 Q. You knew you did not have any light binding wire  
168 there and had not for some time?

A. Not wire.

825 Q. Aside from the fact that you supposed there was an old broom around there?

A. Yes, sir.

826 Q. And you had given directions to your men in general to to find some wire?

A. Yes, sir.

827 Q. Now then you knew that Frank O'Hara reported that he found some?

A. No.

828 Q. You knew that your men had been instructed to find it, and you knew there was none in the tool house?

A. I told them to get some, and someone said there was none there.

829 Q. After they said that you said something about finding some?

A. I said there is binding twine in the car, or get some off of the broom.

830 Q. In other words they were to go out to find something somewhere?

A. It was there in the car, to take it off of the broom I said.

831 Q. When wire was brought back in obedience to your directions to find it, did you pay no attention to an inspection of the wire they found?

A. I did not see it at all.

832 Q. You did not look?

A. No.

833 Q. You did not care?

A. Nobody said anything to me about it.

834 Q. Then according to your judgment you made no attempt to examine where it had been found?

169 A. I supposed that they had gotten the binding twine from the car.

835 Q. You relied on the supposition instead of making an inspection?

A. I did not make an inspection.

836 Q. If wire had been handed up to you would you have paid enough attention to look?

A. Oh, I suppose I probably would.

837 Q. If you had looked you were not giving attention enough to see what it was, is that right?

A. I would see whether it was wire.

838 Q. You did not see the wire?

A. No.

839 Q. You made no investigation?

A. No.

840 Q. You made no attempt to look?

A. No, sir.

841 Q. You testified before in this case?

A. Yes, sir.

842 Q. And at that time were you not asked the following question and did you not make the following answer: "Q. Had you given anyone any directions about wrapping cloth or canvass around the cable where the two ends come together? A. No, sir." Was that question and answer given by you?

A. Yes.

843 Q. It was?

A. Yes.

844 Q. Can you explain why you now testify to instructions that you did give?

A. What?

170 845 Q. Why you have already previously testified in this case that you did give instructions after having given this answer?

A. But I did not give any instructions in regard to wrapping the cloth, only to protect your hand. I don't remember exactly the way that it would be done. I probably could not exactly tell you the way that it is there now.

846 Q. You think now that you did testify to that in the other case?

A. I. told them to wrap the cloth around the sharp ends of that cable to protect their hands, that it would be a good idea to have the cloth on there.

847 Q. "Had you given any one any directions about wrapping cloth or canvass around the cable where the two ends come together?"

A. No, sir." Was that question given and you made that answer?

A. I did not give any certain man, no.

848 Q. Was that testimony given by you?

A. I suppose so.

849 Q. Was the following question and answer given: "Q. But you gave no directions with either rags or wire? A. No, sir."

A. I do to not know whether I did or not.

850 Q. What?

A. I don't know whether I did or not.

851 Q. You don't know?

A. No, I don't remember that.

852 Q. Do you remember of testifying about any broom in the other case?

A. I do not know whether I did or not.

853 Q. Did you testify about a record or book you had in the other case?

A. No, I don't believe there was anything said about a record in the other trial.

854 Q. Do you remember my calling on you at your home 171 to ask you what you knew about it?

A. Yes, sir.

855 Q. And inquired about any record, and at that time you gave me no record and mentioned nothing of any record that you had?

856. Mr. Magaw: Objected to by the defendant as being improper cross-examination.

The objection is sustained.

To which the plaintiff excepts.

857 Q. Do you remember of Mr. O'Hara coming out with a photographer to try to take pictures of the gantry, and you ran him off, did you not?

858. Mr. Magaw: Objected to by the defendant as improper cross-examination. It was probably his duty to do it.

859 Q. Have you any interest or prejudice in this case?

A. No, sir.

860 Q. None at all?

A. No, sir.

861 Q. This carload of poles was about 300 yards from the gantry?

A. Yes, something like that.

862 Q. And the first load headed that way?

A. Yes, sir.

863 Q. It was a little too far to be reached by the operators of the gantry or crane?

A. Probably three or four hundred feet west.

Redirect examination.

Questions by Mr. C. A. Magaw:

864 Q. Was it set in with the switch engine?

A. It was set in the night of the 13th by the switch engine.

172 865 Q. The night that you commenced to unload?

A. It was set in that Saturday night of the 13th. If they did not set it in at night they put it in early enough so we will be ready the next morning.

866 Q. You started to unload the poles on the 15th?

A. Yes, sir.

867 Q. When was it set to the gantry for unloading?

A. When?

868 Q. Yes?

A. It was set Sunday. It was set Sunday morning when I went to work.

869 Q. And was it the first car that you unloaded on the 15th Monday?

A. Well, I cannot say. I might be able to tell you. It was the third car we worked on on the 15th.

By Mr. Yeiser:

870 Q. But it was there however at the time you were making this sling?

A. The poles?

871 Q. Yes?

A. No, they were not set.

872 Q. But they were ready?

A. Yes.

873 Q. Within three hundred yards, the next car to come down?

A. Yes.

874 Q. You knew they were coming on Saturday?

A. I knew we were working on it.

By Mr. Magaw:

875 Q. Did you buy rope and chain for the gantry?

A. Do what?

173 876 Q. Did you buy this rope and chain for the gantry?  
that you used on the gantry?

A. I order it—we order from the general car foreman.

877 Q. It came from the general supply house?

A. They come from the general store.

878 Q. How did you order the rope?

A. If we run a little short on rope for using so many slings I generally go to the foreman and tell him I would like to have an order put in for 500 feet of 1½ inch rope or whatever size is wanted, and I generally get it before we run clean out.

879 Q. You keep a surplus of rope on hand?

A. Yes, sir.

880 Q. How about your chain, where do you get that?

A. We get that the same way from the store room, or department.

881 Q. How about other material that you use, do you get that in the same way?

A. Yes, sir.

Recross-examination.

Questions by Mr. Yeiser:

882 Q. And these chains and ropes and bolts that are brought there are for repairs in supplying the parts that are worn out?

A. Yes, sir.

883 Q. You said that there had been a wire sling there before when you were there before?

A. Yes, sir.

884 Q. Do you know what became of that?

A. No, sir.

885 Q. Was it worn out or broken?

174 A. I could not say.

886 Q. It was used for some purpose?

A. It was used for some other purpose.

887 Q. And that was being made to take the place of the one that had been used?

A. Yes, sir.

888 Q. As a matter of saving of repairing?

A. Yes, sir.

889 Q. You have torpedoes around there sometimes?

A. Not that I have ever seen.

890 Q. You know that torpedoes are used in railroad work?

A. Not for that work. No, sir.

891 Q. Not for that work, you know about them being used?

A. I know they use torpedoes along the railroad.

892 Q. And you know generally of explosions, don't you, the explosions that are used, and caps?

A. I have never been around them.

893 Q. You did not stop to make any inquiry or any investigation about it?

A. No.

Redirect examination.

Questions by Mr. Magaw:

894 Q. I want to check up a little matter. You say you went to work the second time you were employed there in January, 1919?

A. Yes, sir.

895 Q. Now, was there any cable sling used after you went to work at that gantry, in January, 1919?

175 A. Was there any used in January?

896 Q. You worked on this gantry on two different occasions?

A. Yes, sir.

897 Q. The last time you commenced work in January, 1919?

A. Yes, sir.

898 Q. And worked continuously ever since?

A. Yes, sir.

— Q. Now I want to know after you commenced working in January, or when you went to work there in January whether there was any cable sling at the gantry that was being used?

A. Not when I went to work there in January there was none there to use.

899 Q. And there hadn't been any there up until the time you started, until you started to make this one?

A. No, sir.

900 Q. When did you quit working at the gantry prior to the time that you commenced in January, 1919?

A. I think I quit in 1916.

901 Q. So it was away back in 1916 that you refer to when they had a cable sling?

A. Yes, sir.

902 Q. You don't know what they had there after 1916?

A. No, sir.

903 Q. Until you went to work in January of the year 1919?

A. That is right.

904 Q. You know that there wasn't any cable sling there at the time you went to work in January, 1919?

A. No, there was none there then.



176 Recross-examination.

Questions by Mr. Yeiser:

905 Q. You remember the one that they had before had been used on a heavy load and broken, don't you?

A. No. I think when I left there the cable was still there.

906 Q. You knew it was broken after you left?

A. I heard it was broken.

907 Q. And this old cable wire had been brought in to take its place?

A. Well, I don't—

908 Q. That is what you understand about it?

A. We had it there to make slings from, yes, sir.

Witness excused.

909. It being 12 o'clock the court took a recess to 2 p. m. same day, Thursday, June 2nd, 1922, at which time all parties met as before and the following proceedings were had, viz:

CHARLES BERG, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

910 Q. State your name?

A. Charles Berg.

911 Q. Where do you live?

A. Council Bluffs, Iowa.

912 Q. And how long have you lived there?

A. Four years.

913 Q. What is your occupation?

A. Laborer.

177 914 Q. By whom are you employed?

A. The Union Pacific Railroad Company at Council Bluffs, Iowa.

915 Q. How long have you worked for the Union Pacific?

A. Three and one-half years.

916 Q. In Council Bluffs Iowa all the time?

A. Yes, sir.

917 Q. Were you working in Council Bluffs, Iowa at the gantry in the railroad yards on September 13, 1919 when John O'Hara the plaintiff in this case was injured?

A. Yes, sir.

918 Q. You were working for the Director General of Railroads at that time?

A. Yes, sir.

919 Q. Were you present when the accident occurred?

A. Yes, sir.

920 Q. You were a member of the same gang of men that John O'Hara was a member of?

A. Yes, sir.

921 Q. Did you assist the other men in splicing the ends of the cable together that day?

A. Yes, sir.

922 Q. What did you do?

A. Well, I helped tighten the tips on them, the clamps, and I helped put the cloth and wire around the ends of the cable.

923 Q. Where were you when the explosion occurred?

A. I was right there about six feet away from John O'Hara.

924 Q. What were you doing at that particular time?

A. I was not doing anything.

925 Q. Did you see John O'Hara?

178 A. Yes, sir.

926 Q. At the time?

A. Yes.

927 Q. Tell the jury what you saw him, John O'Hara, doing immediately before the accident?

A. I saw he was tapping on the rail with the hammer.

928 Q. What occurred after that?

A. The explosion.

929 Q. Did any part of the explosion strike you?

A. It did.

930 Q. Where were you struck?

A. Right on my neck and wrist.

Cross-examination.

Questions by Mr. John O. Yeiser:

831 Q. Did you see anybody else tap the hammer?

A. No, I did not.

932 Q. And of course you heard it; you heard the noise and the hammer strike?

A. I saw it.

933 Q. When this explosion happened how far away from John O'Hara were you?

A. I was about six feet.

934 Q. Which way were you facing?

A. I was facing north.

935 Q. And John was west of you?

A. He was west of me.

936 Q. Now, will you stand up, and just turn around, and show the jury where that piece struck you?

179 A. Yes, sir. (Witness standing up and showing the jury.)

937 Q. On the neck?

A. It was down like this. It struck me about there.

938 Q. Turn around and point to the jury? You are indicating left side of the neck about the center?

A. Yes, sir.

939 Q. That is where it struck you?

A. Yes, sir.

940 Q. They still used the cable?

A. They used one like it.

941 Q. They have worn that one out?

A. What?

942 Q. That has been cut off, they are using it here?

A. Yes.

943 Q. They made another one to take the place after this had been gone?

A. Yes, sir.

944 Q. You used one before this was made?

A. No.

945 Q. Do you remember the one that was broken; when did you start to work?

A. I started to work in the fall of 1918.

946 Q. Was Turner foreman then?

A. No, sir.

947 Q. Was there a broken cable there at that time, a sling——

A. Well, there was scrap cable in the tool house.

948 Q. There was an old broken sling there too?

A. No.

949 Q. Before this case was tried Mr. Travis and I came over to see you and you told us this same story, did you not?

180 A. I think so.

950 Q. That was a few days before we filed the suit?

A. Yes.

951 Q. And we came to investigate about the facts?

A. Yes, sir.

952 Q. And to know what you claimed that you saw?

A. Yes, sir.

Witness excused.

181 Miss *CHERIE M. GRAY*, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Bockes:

953 Q. State your name?

A. Miss Cherie M. Gray.

954 Q. Were you living in Omaha during the year 1919?

A. Yes, sir.

955 Q. And in what capacity of any were you employed at that time?

A. I was in Mr. Whittaker's office employed as a stenographer and his assistant.

956 Q. Engaged in general stenographic work?

A. Yes, sir.

957 Q. Do you remember the occasion of being called to accompany a representative of the Union Pacific Railroad to St. Joseph's Hospital and taking the statement there of John O'Hara the plaintiff in this action?

A. Yes, sir, I remember that.

958 Q. Do you know what day that was?

A. No, I could not say. It was in the fall I think.

959 Q. Now, did you go to the hospital and take the questions and answers as you heard them on that occasion?

A. Yes, sir.

960 Q. The statement consisted, did it not, of questions asked by Mr. Van Noy, and answers given by John O'Hara the plaintiff?

A. Yes, sir.

961 Q. How did you take those questions and answers?

A. In shorthand.

962 Q. And what if anything did you do after taking them down in shorthand with reference to transcribing your notes?

A. Well, I just simply brought my book back to the office and transcribed the notes in type-writing.

963 Q. What if anything was done with the transcript of your notes?

A. It was delivered to the Union Pacific.

964 Q. And do you know where your original stenographic notes are?

A. Well, I do not know. They are destroyed, that is all.

965 Q. Have you made a search for them and were you unable to find them?

A. Yes, sir.

966 Q. Have you at this time, Miss Gray any independent recollection of the several questions and answers that you took down on that occasion?

A. Well, not particularly except that he asked how it happened and the names of the people.

967 Mr. Travis: I object to any further answer on the part of the witness.

968 Q. Do you have any independent recollection of the language used in the questions and the answers so that you can tell the jury independent of your notes or transcript just what questions and answers were given and taken down by you?

A. I can remember some statements substantially. I do not suppose I can remember them every word.

969 Q. Did you take down the questions and answers correctly as you heard them at the time, Miss Gray?

A. Yes, sir.

970 Q. And were they correctly transcribed by you in the transcript which was delivered to the Union Pacific?

A. Yes, sir.

971 Q. What if anything do you recall, independent of the transcript was said by John O'Hara relative to the manner in which the accident occurred?

972 Mr. Travis: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and the witness is not qualified to answer.

The objection is overruled.  
To which the plaintiff excepts.

A. Well, I simply have a recollection that he told of having this wire in his hand and something on the end of it, and that he tapped it on the rail.

973 Q. Are you able independent of the transcript to give his exact language, Miss Gray?

A. I do not believe I can remember it word for word, no, sir.

974 Q. I will ask you to examine the transcript which I now hand you, and state whether or not that is the transcript of your notes which you made and delivered to the Union Pacific and to which you have referred in your previous testimony?

975 (Handing the witness type-written document of several pages.)

A. Shall I read it over now?

976 Q. Do you know without reading it, or if it is necessary read it?

A. It has all the appearance of being the transcript that I delivered.

977 Q. You have examined it and read it through?

A. Yes, sir.

978 Q. And is that the transcript which you made and delivered to the Union Pacific containing the statements of John O'Hara?

A. Yes, I would be willing to say that that was.

979 Q. Now, I will ask you to refresh your recollection, Miss Gray by referring to the transcript and I will ask you whether or  
184 not on that occasion that you have referred to John O'Hara was asked this question by Mr. Van Noy:

980 Mr. Yeiser: I desire to cross-examine as to her qualifications and competency to use this document as to refreshing her memory. Permission to examine is granted.

Questions by Mr. John O. Yeiser:

981 Q. Miss Gray, you say you took the notes and made a copy thereof; that you destroyed your notes and gave the copy to the Railroad Company?

A. Well, the notes were not destroyed, as I remember, until, quite some time after the transcript was delivered. I did not destroy them myself.

982 Q. You did not?

A. No.

983 Q. Mr. Whittaker destroyed the notes?

A. Yes, at least I supposed he did. They were in the file.

984 Q. Were you present when he destroyed them?

A. Yes, I was.

985 Q. Did you see him do it?

A. Well, I will explain how it was.

986 Q. Did you see him do it?

A. Well, I suppose I did, because I was looking right at him when he was going through the files.

987 Q. Now Mr. Whittaker had been in the employ of the Union Pacific for some time before on legislative work?

A. No, he had not. That particular department he had not done any work for them for about six months.

988 Q. He had also represented them in Lincoln at different times?

185 A. I do not know.

989. Mr. Magaw: Objected to by the defendant as not proper cross-examination.

The objection is sustained.

To which the plaintiff excepts.

990 Q. Now, Miss Gray, after you delivered that, after you made a transcript you immediately delivered it to the Union Pacific?

A. Well, practically so. We usually delivered it as soon as we could after we had it type-written.

991 Q. It was never given back to you until you were called as a witness at the last trial?

A. No, I never saw it after that.

992 Q. When it was given back to you shortly before your testimony you then looked it over and read that transcript before you testified?

A. Yes, sir.

993 Q. This independent recollection that you speak of was just based on your reading of the transcript they gave back to you?

A. Most of it would be except one or two words came to me immediately.

994 Q. Your memory was refreshed by reading this transcript that had been in the hands of the Union Pacific until they gave it back to you at the last trial?

A. Yes, it refreshed my memory, of course.

995 Q. You did not have an independent memory of it until you had read it over?

A. Well, I really had not given it any thought until that time.

996 Q. And another thing I think you stated at that time at the trial, that the only thing is it looked like your type-writer and the paper that you used, and on the general subject of John O'Hara?

186 A. Yes, I would say that was our same paper and our same typewriter.

997 Q. And you largely then depended upon that being handed back to you, is that true?

A. Upon what? I did not understand you.

998. Q. You largely depended upon this transcript that was handed back to you, that the fact that it looked like your paper, and it looked like your machine, and together with the fact that it was on the subject of this explosion?

A. Well, I will say that though there never had been anything said about a transcript if someone had asked me about it I could not have remembered some things about it if I had never seen the transcript, and if I had had to recall it.

999 Q. Had some slight changes been made in it you would not have been able to pick out the slight changes?

A. I would not swear that I could.

1000 Q. You had not memorized the transcript?

A. No.

1001 Q. Now then, do you not in writing up a transcript, edit your notes sometimes, and find it necessary to make it read intelligently?

A. How do you mean?

1002 Q. Look it over carefully and study your notes in order to edit them, so that it——

A. Well, I have done it many times—studied my notes.

1003 Q. A great many times in making them—in taking your shorthand and writing it up you miss parts and are compelled to depend upon memory of some sort in order to straighten it out?

A. Well, that might be so in some cases. I think you can ask Mr. Travis and he will tell you. He is — competent than  
187 I am. He is quite an experienced reporter. He has been in the——

1004 Q. You have had some experience?

A. I had just a little experience.

Q. You don't regard yourself competent to take questions and answers in court proceedings?

A. Well, I don't regard myself able to go in court.

1005 Q. Could you take it now if I dictated some to you?

A. I have not done any of it for three months.

1006 Q. Would you be able to do it?

A. I do not know. I would not attempt it because I have not done any of it for three months.

1007 Q. So on this transcript then where your notes were destroyed the only thing you can do is if it was on the general subject, you would know something about it refreshed by the fact that you read this transcript that had been delivered to the Union Pacific?

A. Yes, I would know something about it, of course.

1008 Q. It was on that general subject?

A. Yes, aside from perhaps a few little details that might come to my mind outside of that.

1009 Q. Give us the circumstances under which these notes were destroyed?

A. I do not know the time of day, but Mr. Whittaker quite often went through his files. His books accumulated, and we were rather limited for room up there. Our office was not very large and he, every few weeks say, he would go through his files to see what he could dispense with, in order to make room for our other stuff that was coming in, and he had quite a bit of this Union Pacific work, and he had not been doing any of their work for some few months, and he made the remark that——

1010 Q. I do not want his remarks?

188 A. He simply did not want them in his files any more and destroyed them.

1011 Q. At that time you knew that this case had not been tried?



1012. Mr. Magaw: Objected to by the defendant as being improper cross-examination.

The objection is overruled.

To which the defendant excepts.

A. I really had not spent any thought on the case at that time.

1013 Q. He purposely destroyed those shorthand notes?

A. Well, he did so deliberately.

1014 Q. And when you were engaged to take those notes you were an employe of Mr. Whittaker?

A. Yes, I was in his office.

1015 Q. And the Union Pacific had employed you as a servant of Mr. Whittaker to do it?

A. Yes, sir.

1016 Q. He deliberately destroyed the notes?

A. They belonged to him, and he was engaged on some other work.

1017. Mr. Yeiser: The plaintiff objects to the statement for the reason that it appears that the agent of the Union Pacific in taking the shorthand notes deliberately destroyed them, which is the best evidence, and which would be the original notes which she could read and use.

The objection is overruled.

To which the plaintiff excepts.

Questions resumed by Mr. Boekes:

1018 Q. I will ask you to refer to the transcript which you have identified before and I will ask you if on that occasion John O'Hara was asked this question by Mr. Van Noy: "Q. How did you happen to get injured, John?" and if in reply to that question John O'Hara did not state: "A. We were fixing that cable and looking for a piece of wire to wire some canvass on to the *the* cable so we would not cut our hands on it and my uncle found this bit of wire and he cut the wire off and it had a little brass tube on the end of it. I had the brass tube and I wasn't doing anything so I tapped that little tube—it had yellow stuff in it, and I was knocking that powder out, or whatever it was, I don't know—I was tapping that thing and I turned it around and hit it on the other end and the thing went off." Was that question asked John O'Hara at that time and did he make that answer Miss Gray?

1019. Mr. Yeiser: Objected to by the plaintiff for the reason that it is not the best evidence, and for the further reason that the transcript would be the best evidence, and in this instance the notes from which the transcript was made; the original notes were taken in shorthand and deliberately destroyed by a representative of the Union Pacific, and this transcript is not properly identified.

1020. Mr. Magaw: I object to the statement that these notes were destroyed by a representative of the Union Pacific for the reason that Mr. Yeiser has already established that they were destroyed by Mr. Whittaker who was not a representative of the Union Pacific.



1021. Mr. Yeiser: He was the servant of the Union Pacific to do this as much as an engineer running an engine.

The objection is overruled.

To which the plaintiff excepts.

A. You wanted me to identify that?

1022 Q. Question repeated.

A. Yes, I will say so.

190 1023 Q. I will ask you further by refreshing your recollection from this transcript whether John O'Hara was then asked by Mr. Van Noy this question, following the one which I have already read: "Q. It exploded?" and whether John O'Hara made this answer: "A. Yes, I was tapping the open end. One end was closed, and I was trying to get the powder out of it, and when I hit the closed end it went off." Was that question asked and did Mr. John O'Hara the plaintiff make that answer, Miss Gray, at that time?

1024 Mr. Yeiser: Objected to by the plaintiff for the reason that it is not the best evidence, and for the further reason that the transcript would be the best evidence, and in this instance the notes from which the transcript was made; the original notes were taken in shorthand and deliberately destroyed by a representative of the Union Pacific, and this transcript is not properly identified.

The objection is overruled.

To which the plaintiff excepts.

A. Yes, I will say yes to that.

1025 Q. I will ask you if on that same occasion John O'Hara was asked by Mr. Van Noy this question: "Q. And it was full of powder?" and whether John O'Hara the plaintiff in answer to that question made this reply: "A. Some kind of yellow stuff. I don't know whether it was powder or not?"

1026 Mr. Yeiser: Objected to by the plaintiff for the reason that it is not the best evidence, and for the further reason that the transcript would be the best evidence, and in this instance the notes from which the transcript was made; the original notes were taken in shorthand and deliberately destroyed by a representative of the Union Pacific, and this transcript is not properly identified.

191 The objection is overruled.

To which the plaintiff excepts.

A. That question was asked and answered that way.

1027 Q. I will ask you if on the same occasion John O'Hara the plaintiff was asked the following question by Mr. Van Noy: "Q. You say your uncle, E. W. O'Hara gave you this little copper tube?" and if in reply John O'Hara made this answer: "A. He cut the wire off and I took it, about the same as giving it to me. I went up after he cut it off and he held it in his hand." Was that question asked and that answer given by John O'Hara on that occasion Miss Gray?

1028 Mr. Yeiser: Objected to by the plaintiff for the reason that it is not the best evidence, and for the further reason that the transcript would be the best evidence, and in this instance the notes from which the transcript was made; the original notes were taken in shorthand and deliberately destroyed by a representative of the Union Pacific, and this transcript is not properly identified, and further as not covering anything that the plaintiff testified to.

The objection is overruled.

To which the plaintiff excepts.

A. Yes, sir.

Cross-examination.

Questions by Mr. John O. Yeiser:

1029 Q. Miss Gray had you done any other work for the Union Pacific?

A. Well, I had not been with Mr. Whittaker very long then. I think I had been on two or three other cases before that.

1030 Q. What other cases had Mr. Whittaker been on?

1031 Mr. Bockes: Objected to by the defendant as not proper cross-examination.

192 The objection is sustained.

To which the plaintiff excepts.

1032 Q. Miss Gray at that time you remember in a general way that John told you that he had struck this cartridge or this cap and it exploded?

A. Yes, sir, that was the substance of what he said, that he tapped it, or something like that.

1033 Q. At that time had anything been said about his uncle having got some yellow powder out of it?

1034 Mr. Bockes: Objected to by the defendant as being improper cross-examination.

The objection is overruled.

To which the defendant excepts.

A. Well, I remember he spoke of his uncle handing him the wire, but as to that yellow powder I don't know just when that was mentioned. I remember it was mentioned, but I do not know just what part.

1035 Q. Do you remember at that time whether something was said about his uncle having gotten some yellow powder?

A. I don't just recall it.

1036 Q. At that time you remember of his stating when this explosion happened he was working there on the gantry fixing up the wire and cloth on this cable? Is not that true?

A. No.

1037 Q. What is it?

A. He was not working. I just read the transcript over a little while ago.

— Q. You are not using your independent recollection; it is what you read in the transcript?

A. That transcript is the facts.

193 1038 Q. What?

A. That transcript is the facts.

1039 Q. You rely on the transcript as a fact?

A. Surely.

1040 Q. But you do not have any independent recollection about his working?

A. I do remember that he said he was not working at the time, Yes, sir.

1041 Q. When did they hand you that part of the transcript to read over again last?

A. You mean—

1042 Q. Just before you testified?

A. Well, about half past one I guess.

1043 Q. So that you remember now that you read that part that contained the statement in it that he was not working?

A. As I say, I can remember that he said that he was not working at the time.

1044 Q. You independently can't remember whether he was there or not, you only remember that you saw it in this transcript?

A. No. I remember that he said he was not working, outside of the transcript.

1045 Q. You can't remember outside of the transcript?

A. I can remember outside of the transcript.

1046 Q. That he said he was not working?

A. Yes, sir.

1047 Q. What is there that caused you to remember that phrase?

A. Well, I do not know as that is the exact wording.

194 1048 Q. You have no knowledge of the Workmen's Compensation Act and the decisions on whether a person was an employee or not?

A. No.

1049 Q. Was there any thing mysterious or strange in that little part of the interview that he was not at that instant working?

A. Well, there was a combination of circumstances that rather impressed it on me.

1050 Q. What was it that impressed that so that you would remember it?

A. Well, he described himself as sitting there tapping that, and I had a vivid picture of that young man tapping that and having that thing blow out on his face. It made an impression.

1051 Q. You had an impression that he was sitting there and tapping it?

A. Yes, sir.

1052 Q. From the fact that he was sitting you thought he was not working?

A. He said he was not working. He said, I was not doing anything at the time, or words to that effect.

1053 Q. And you remembered that feature of it and that it was so important that it made an impression on you and you remember it independently?

A. Well, the idea came to my mind, if you want me to go into it, that there was a party sitting idly tapping something and having such a tragedy occur, it impressed me, because, well, I might go further and say that this might have impressed me more on account of my own brother had very much the same experience, as a young boy with dynamite, and this combination of circumstances rather impressed me.

1054 Q. You don't know anything about whether he tapped it with a hammer, or fingers or swung it or how; it was tapping that was all?

195 A. Well, the independent recollection that you speak of is tapping.

1055 Q. And of course you would form some mental picture?

A. Yes, sir.

1056 Q. He did not express those particular words?

A. No.

1057 Q. It was tapping or striking?

A. Yes, sir.

1058 Q. Can you remember, or did you read more of that transcript than those two passages?

A. They gave it to me and asked if I could identify it. I read it all from beginning to end.

1059 Q. You read the whole transcript?

A. Yes, sir.

1060 Q. Do you remember testifying at the last trial of this case?

A. Yes, sir.

1061 Q. And were you not asked the following questions and did you not give the following answers: "A. Well, I just tell what I can remember. Q. All right. A. I was called by the Union Pacific to go out to the St. Moseph's Hospital to take a statement of this young man. I recall that we went into his room, and some member of his family was present—I believe his sister, and Mr. Van Noy of the Union Pacific went with me, and Mr. Van Noy asked him to tell what he could about this accident, and the boy told him as far as he could remember about it. The things that stand out in my memory are that he had something in his hand which exploded, and I knew that he was effected in his eyes as he had his head bandaged, but I do not think that I could go on and state any further specifically what was asked." Was that question asked and that answer given?

196 A. Well, I would have to read it, Mr. Yeiser, because you garbled a statement for me in the former trial, and I would have to read it to see.

1062 Q. You may have the pleasure of reading it yourself. (Handing the transcript to the witness.)

A. Well, I would say that that was what I said. I have confidence enough in the reporter.

1063 Q. And in my garbling statements I deliberately read it a little bit different?

A. Yes, sir.

1064 Q. To see whether you remembered it or not?

A. You bet.

1065 Q. That was embarrassing to you, was it not?

A. Not a bit. It was embarrassing to you.

1066 Q. You recall the spot?

A. I remember you said I did not trust you much which I didn't.

1067 Q. You don't trust me?

A. No.

1068 Q. We have not been acquainted long, have we?

A. Well, I know you pretty well.

1069 Q. Now, at this same trial were you not asked the following question and you gave the following answer: "Q. Did he say how it exploded, if you remember? A. Well, as I remember it, the word "tapping" comes into my mind. I can recall the word tapping. I do not remember whether he was tapping it. I have it in my memory that it was something about tapping it." Was that question and answer given, and to restore confidence I will permit you to read it again.

A. Yes, sir.

197 1070 Q. Is that true because you remember it, or because you have confidence in the reporter?

A. Oh, I remember that now, outside of this.

1071 Q. Now then, why did you not remember it then any more than what you have given, and remember it so clearly now?

1072 Mr. Bockes: Objected to by the defendant as not reflecting the facts, the witness testified that she remembered the same in both times, it does not contradict anything the witness testified to.

Question is withdrawn.

1073 Q. Were not the following questions and answers given also at the former trial: "Q. Was there anything said about a cap exploding? A. A cap? Q. Yes? A. I do not recall the word cap, but something that he had in his hand exploded." Were those questions and answers given at that time?

A. I believe they were, sir.

1074 Q. Now, will you take a pencil and take dictation that I will read, say from question 1142 of this bill of exceptions of the former trial——

1075 Mr. Bockes: I object to this as it is not proper cross-examination.

1076 Q. And I will read it slowly to you.

1077 Mr. Bockes: I object to this as it is not proper cross-examination.

1078 Mr. Yeiser: I just want the young lady to take this statement.

1079 Mr. Bockes: The witness said she has not done any work for three months.

1080 Mr. Yeiser: Three months does not disqualify them.

198 They can take it slow and accurately, and I will go slow enough.

1081 Mr. Bockes: I object to it, as it is not proper cross-examination, and improper.

1082 Q. Would you consent to do it?

A. No.

1083 Q. You decline to do it?

A. Yes.

1084 Mr. Bockes: We ask for a ruling on the objection.

The objection is sustained.

To which the plaintiff excepts.

1085 Q. John O'Hara's eyes were wrapped up at that time, were they not?

A. Yes, they were bandaged.

1086 Q. And what court experience had you ever had before this?

A. Well, I do not just recall, Mr. Yeiser. Mr. Whittaker had been working me in on depositions, and I believe I was in the Municipal Court two or three times before that, and I had done some deposition work in his office.

1087 Q. Just this one last question. Do you feel any better towards me now?

A. I do not feel unkindly towards you at all.

Witness excused.

199 O. B. MONAHAN, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Magaw:

1088 Q. Will you state your name?

A. O. B. Monahan.

1089 Q. Where do you live?

A. In Chicago, Illinois.

1090 Q. What is your occupation?

A. I am employed by the Du Pont Powder Company of Wilmington, Delaware.

1091 Q. Where?

A. At the Chicago office. I am employed in the sales department and work in connection with the technical division, carrying on tests with electric blasting caps, detonators, and blasting caps, and high explosives for the technical division, at the Chicago office.

1092 Q. How long have you been connected with that kind of work?

A. Since 1902.

1093 Q. Have you had experience in handling what is known as electric blasting caps?

A. Yes, sir, a very extensive experience.

1094 Q. Just tell what you have done in that respect?

A. I have supervised the blasting operations on some of the largest explosive and blasting operations in the United States, such as the big copper companies and cement plants, and rock quarries, stone quarries municipal work, contract work, mining operations, and so forth.

1095 Q. I now hand you Exhibit 3 and ask you to state if you know what it is?

200 A. That is a dummy electric blasting cap with a four foot wire.

1096 Q. How many wires?

A. There are two wires.

1097 Q. What is the purpose of the wires?

A. They carry the ignition to the fulminate or the explosive charge in the capsule.

1098 Q. Is that worked by electricity?

A. Yes, sir, it is.

1099 Q. It requires a battery and a current of electricity to discharge these caps as they are used?

A. Yes, sir.

1100 Q. You speak of this being a dummy electric blasting cap, what do you mean by that, what do you mean by the dummy?

A. The explosive charge has not been filled in. It is contained in the bottom part of the capsule before the wires and the plugs are inserted, and the hole is evidence of the fact that it has been—

1101 Q. Is there a hole in the end of the regular blasting cap?

A. No, sir, that is closed in order to contain the explosive.

1102 Q. Will you please tell the jury where the charge—the explosive charge is loaded into the shell or cap?

A. The explosive charge is loaded about half way of the depth of the shell. Then the wires are inserted. There is a connection at the bottom of the wires that makes the contact. That heats to red heat when the current is applied and detonates the explosive charge in there. On top of that—in fact the wires are insulated near the bottom of them and this connecting wire with the plug, and then on top of that is a bitulithic, an asphalt filling, and above that is the sulphur. There is liquid sulphur poured in to make it weather proof, and so-called fool-proof to keep people from meddling

201 with them.

1103 Q. I now hand you two wires with a plug attached to the end and marked Exhibit 21 and ask you whether or not that plug is the same character of plug as that to which you have referred? (Handing the witness Exhibit 21.)

A. Yes, sir; that is the first preparation of these wires prior to inserting them into the capsule and on to the explosive charge.

1104 Q. After the explosive charge is placed in the shell then the wires with this plug are pushed down into the shell on top of the explosive?

A. Yes, sir, the purpose of placing the plug in that position is to



offer an insulation of these wires and to keep them from shortening, or to keep the wires from shortening in the capsule.

1105 Q. After the plug is inserted is there any thing else filled in on top of the plug?

A. Yes, on top of the plug—that plug is placed so—there is a connecting wire called the bridge. At first the fulminate is pressed in there under pressure, then a light charge of loose fulminate is placed in, and then the wires are placed in there, directly down and in contact with this explosive charge. On top of that is an asphaltum pou-ed in there, and on top of that is the liquid sulphur as a protector.

1106 Q. So the explosive charge is completely protected within the shell?

A. Yes, sir.

1107 Mr. Magaw: The defendant offers in evidence Exhibit 21 just identified.

There being no objection same is shown to the jury, and here follows:

**Exhibit 21 (2 Wires & Plug).**

202 [NOTE.—Exhibit 21 to Monahan's testimony, being 2 wires & plug. Physical exhibit omitted in printing.]

203 1108 Q. Are you familiar with what is known as the ordinary blasting cap?

A. Yes, sir.

1109 Q. Will you tell the difference between the ordinary blasting cap and the electric blasting cap?

A. The ordinary blasting cap is a capsule which is a trifle larger than this. It does not have this crimp. This crimp was put in there in order to help keep the plugs there in place. The ordinary blasting cap is a plain tube and it is filled with explosive material to about the same height in the shell as the electric blasting cap, but the one end is open, the end here where the wires enter, whereas in the electric blasting cap it is closed and p-ugged up with thdse various substances; but this leaves an open cap.

1110 Q. What is the purpose of that?

A. It is in order to permit of inserting what we term safety fuses. And it is about the size of this cap. That fuse is placed into the cap and put down in contact with the explosive charge of the capsule, and then is crimped at the top in order to hold it firmly in place—the electric—

1111 Q. How is that discharged, by lighting the fuse?

A. By what we term safety fuse. This fuse that is ignited by a match contains a powder drain through the center, and you ignite it with the match, and it burns at the rate of 29 to 54 seconds to the foot. It depends upon the quality of the fuse, but it must be ignited by a match or light of some sort to burn through.



1112 Q. In the ordinary blasting cap one end of the shell is left open so that the explosive charge is exposed?

A. Yes, sir.

1113 Q. What are these electric blasting caps use- for?

204 A. Well, they are frequently used for the safety of them, and they are used in order to shoot a great number of holes, what we call a series of holes instantaneously. With the fuse method of shooting there is some variation even though you cut the fuse all the same length, but there is some variation when you frame the shooting of a great number of holes at one time. They are used on mining, and in quarrying, and in gold mining, and ditch blasting, in road work and so forth.

1114 Q. Are they used commercially?

A. Yes, sir. We sell millions of them a year.

1115 Q. And what class of people use them?

A. What class?

1116 Q. Yes?

A. Well, just the ordinary laborers, the explosives are used by.

1117 Q. Do miners use them?

A. Yes, sir. Not altogether, because squibs are used where black powder is used the safety fuse is used.

1118 Q. Are they used in quarries?

A. Yes, almost exclusively.

1119 Q. When the caps are shipped or when they are distributed to the trade are the wires folded up or how are they shipped?

A. Yes, the wires are folded, and they are folded by machinery, and every wrapping is a crease wrapping, and the end of the wire is merely wrapped around the wire in that manner (indicating).

1120 Q. Have you seen the men around the quarries and mines handling these caps?

A. Yes, sir.

1121 Q. How do they straighten these wires out?

Mr. Yeissr: Objected to by the plaintiff as being immaterial.

205 The objection is overruled.

To which the plaintiff excepts.

A. There are different ways, but the most general practice I suppose you want?

1122 Q. Yes?

A. They unwrap this wire and of course it is wound from the opposite end, the first part of the process is from the cap end, and they throw it out in that manner. The larger ones they take in their hands and straighten them out. The long ones run up to 100 feet, but the short ones they pull them out by hand. The longer lengths—16—24 and 30 it is very easy, and the weight of the cap helps to throw it away and they become accustomed to it—they become experts at it, and they throw them out quickly.

1123 Q. Do they throw the cap end out from the wires?

A. The cap end is whipped out.

1124 Q. In doing that do they sometimes strike a stone?

A. They could not throw it out without striking stones or empty boxes, or something of that sort, anything that would be laying around.

1125 Q. Did you ever know of one being exploded from such a blow as it would receive in being whipped out that way?

1126 Mr. Yeiser: Objected to by the plaintiff as being immaterial and incompetent.

The objection is sustained.

To which the defendant excepts.

1127 Q. Have you ever seen that—to what extent have you seen caps handled in that way?

A. I personally have used tens of thousands of them, and I have seen—

206 1128 Mr. Travis: Objected to by the plaintiff as having been answered.

A. I have handled tens of thousand-. They buy frequently 25,000 at a time in the quarries.

1129 Mr. Yeiser: This is objected to by the plaintiff as being incompetent, irrelevant and immaterial, and not a proper hypothetical question, and not embracing facts shown in this case, and it is improper at this time, and prejudicial.

1130 Mr. Bockes: I object to such statements as untrue and improper conduct before the jury.

The objection to the question is overruled.

To which the plaintiff excepts.

A. Well, the foremen, as we term them, they usually have a powder gang. The powder gang consists of from 2 to 10 to 20 men, and they are made up largely of laboring men and Hungarians and Italians, or any class of labor that they have to employ on that particular job, and I have seen them receive some very severe treatment.

1131 Mr. Travis: I object to that statement, I have seen them receive some very severe treatment, as not responsive, and move that it be stricken from the record.

A. I am not attempting to state any specific instance to you.

The motion is overruled.

To which the plaintiff excepts.

A. I have seen them receive some very severe treatment. I do not know what to infer from the question, whether I am to answer some of the most severe treatment or the ordinary treatment that these receive?

1132 Q. I ask about the ordinary treatment?

207 A. Well, they come packed fifty in a box. They open the box, they have what they call their powder box around the quarries. They take several of these if they have ten or twelve holes, they put out a corresponding number of explosives—two or

three to a hole, or one. They take a great number of explosives and put them in their ordinary box made convenient to carry and carry it out on the job and use them.

1133 Q. Now, have you made tests with them, with the loaded electric caps by striking them against a hard substance yourself?

1134. Mr. Travis: Objected to by the plaintiff as being cross-examination of his own witness.

The objection is overruled.

To which which the plaintiff excepts.

A. Yes, sir. I have.

1135 Q. State what you found in that particular?

A. I have done it on several occasions, on the last occasion I tied an electric exploder with a six foot wire, two feet longer than these. I tied it to my cane in this manner and I whipped it around the curve on a steel magazine. The magazine was about  $\frac{7}{8}$  inch thick, and I whipped it around there until one of the wires broke. It indented the shell in several places. I did that for two purposes: to see if it would go off and to measure and observe the stability of this bridge that was in there. I afterwards connected up the exploder and fired it. I wanted to see what effect it would have on it. I was primarily testing the stability of the bridge in there, because it is a very small wire and I experimented with it for our own information, and it was whipped around a steel ordinary magazine.

1136 Q. Did it explode?

208 A. No, it did not. I exploded it afterwards with the current.

1137 Q. Mr. Monahan will you state whether or not an electric cap that is attached to a wire four or five inches in length, such a wire as is attached to that cap, and a person had hold of that cap in his left hand and was pulling on the wire with his right hand to straighten it out, and it slipped out of his left hand, and the cap whipped around and struck a railroad rail, whether or not such a blow would in your opinion cause the cap to explode?

1138. Mr. Travis: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question, and the witness is not qualified to testify as an expert, and it does not contain the proper elements presented in this case.

The objection is overruled.

To which the plaintiff excepts.

A. I would say it would not.

Cross-examination.

Questions by Mr. J. C. Travis:

1139 Q. Are you a chemist?

A. No, sir.

1140 Q. You are a salesman for the Dupont Powder Company?

A. I am a salesman and I also operate and carry on particular

practical tests with electric detonators or blasting caps and *and* blasting caps and high explosives.

1141 Q. Where did you make these tests?

A. In the field, in Indiana, Illinois, Michigan, Wisconsin, Iowa, Kentucky, Pennsylvania and wherever we are called to make them.

1142 Q. Wherever you sell them you test them?

209 A. No, sir. Where some of the other salesmen are selling them.

1143 Q. What tests have you put them through at these different places?

A. Well, it depends upon the test that we are sent there to make.

1144 Q. What are the tests?

A. With what?

1145 Q. With the electric detonator?

A. The electric detonator, we go there to show them the added safety of using electric detonators over the old type of blasting cap, or the ordinary blasting cap.

1146 Q. There is absolutely no difference between the electric detonator and the ordinary fuse detonator—the ordinary detonator is there?

A. If I was a buyer and I asked for an electric and you shoved a fuse—

1147 Q. Is not the ordinary detonator the fuse detonator?

A. No, they have absolutely no relation except the size of the capsule and the explosive.

1148 Q. You want the jury to understand when you say ordinary detonator you don't mean a fuse detonator?

A. I don't mean a fuse detonator.

1149 Q. What is the difference between the ordinary detonator—

A. An ordinary blasting cap and fuse detonator may be a time fuse? It may be used for a safety fuse. An ordinary blasting cap is what you term the plain capsule that is to be used with safety fuse.

1150 Q. Your safety fuse is of two kinds?

A. Several.

1151 Q. There are two kinds of fuses, the time and the  
210 instant-aneous fuse?

A. The instantaneous, what do you mean?

1152 Q. I mean fuse. Don't you have those that will travel a mile a minute?

A. I never heard of it. There may be, you will have to refer to Cordeau speed fuse.

1153 Q. You never heard of the instanten-ous fuse?

A. The word fuse, and instantaneous fuse is employed an an electric detonator.

1154 Q. Do you mean to say in your experience you have not seen a red fuse wrapped with cord as distinguished from a white fuse that is smooth, and the red fuse being a fuse that will explode at the rate of something like a mile a minute?

A. If you will please go over that again. I did not get that. I

don't know; we must not sell it. I never heard of the lot of fuses you explain to me. If you would go over it again for me.

1155 Q. In the beginning. This is an electric fuse detonator?

A. Yes, sir (indicating).

1156 Q. This is an electric blasting cap because it has electric wires which go into it so as to ignite it with electricity?

A. Yes, sir.

1157 Q. We will forget the wires. We will take the cap. The detonator itself has fulminate of mercury, or some other substance in the half that is enclosed?

A. Yes, sir.

1158 Q. In the other half, the half towards the opening, it has either this electrical method of exploding, it or else there is a  
211 vacant space there, a vacancy in there in which we can insert a fuse, is not that so?

A. Yes, sir.

1159 Q. That is true?

A. Yes, sir.

1160 Q. Those are the only two kinds of detonators?

A. That is the two commercial detonators.

1161 Q. Those are the only two kinds you have seen sold commercially?

A. Sold commercially, yes, sir.

1162 Q. And those were the kind that were sold to the army?

A. No, sir, there were many types. I would not attempt to pass upon that because—there were many types of percussion caps sold to the army.

1163 Q. I am speaking about detonators of this type?

A. They are used for the same purpose. Detonators and percussion caps are used for the same purpose.

1164 Q. A percussion cap is used to start off black powder and known as—used as such in the army, is not that so?

A. I would not answer anything connected with the ordnance department.

1165 Q. We will go back to commercial detonators. The only difference as we have agreed between us is this between the electric and the ordinary blasting detonator: One has the wires run in with the assembling parts, and the other is vacant in the upper half?

A. No, there is some difference in the length of the shell and some other slight difference, and a difference, too, in the make of the shell.

1166 Q. You have different sizes of shells?

A. Two sizes.

212 1167 Q. You have more than two sizes?

A. Only two commercial sizes.

1168 Q. The explosive in these detonators is the same size?

A. With the same strength detonator.

1169 Q. But will you say that the detonators of this type that have the same amount of explosive, and that they are put in the same way in the electric as the explosive in the ordinary detonator?

A. No, sir.

1170 Q. Well, what is the difference?

A. Well, to begin with an electric detonator, there is a compressed charge in that detonator of detonating explosive, and then there is a loose charge, whereas in the ordinary blasting cap they could not have that loose charge on top, because of the open end it could not do to make it that way.

1171 Q. Do you want the jury to understand that there is any difference, in addition to the ordinary charge that is pressed in that there is some loose fulminate placed on the top in the electric?

A. Or some other substance. It is not necessary for it to be fulminate.

1172 Q. In the ordinary detonator in which the fuse is inserted the fulminate is packed in there under a certain pressure?

A. Yes, sir.

1173 Q. There is a ring crimped about half way?

A. No those caps were not successful. There never was a ring crimped around. There was a certain type of cap made but it was never sold commercially.

1174 Q. You never heard of a fool proof ring being put on a detonator?

A. It was originated by a man I know well, but it was not commercialized.

1175 Q. It was never used in the army?

A. I am not speaking of the army. I am speaking of commercial explosives.

1176 Q. You know they put it in there for a certain purpose?

A. Not in commercial blasting caps, and not in ordinary blasting caps or electric blasting caps.

1177 Q. You say it is not true?

A. I am not speaking about ordnance goods, or of ordnance guns.

1178 Q. They were the same as these?

A. They don't use electric blasting caps in the ordnance.

1179 Q. Do you mean to say that they used no caps such as that in the army?

A. Electric blasting caps are used by certain departments but only by certain branches.

1180 Q. Did you ever see Livens projectiles fired?

A. I do not know a thing about ordnance. I know about mining explosives, and commercial.

1181 Q. You know the commercial explosives?

A. I am not trying to qualify as an expert on ordnance. I am not attempting to answer something I do not know anything about.

1182 Q. I will ask you, if it is not a fact that in these ordinary fuse detonators there is a ring about the center of them, and that ring is there for the dual purpose of prohibiting the compact fulminate of mercury packed in the bottom from slipping down in the upper exposed end, and for the purpose of prohibiting the fuse that is inserted from touching the fulminate of mercury?

A. I want to say that I know there is no such blasting cap as that sold commercially, because I know there was not.

214 1183 Q. You will not say anything about the ordnance?

A. No.

1184 Q. The Dupont Powder Company don't make them for the army?

A. I say that I am not in that end of the manufacturing of it, and I could not answer that.

1185 Q. The proper way to explode it is with a spark, either kind?

A. With either kind?

1186 Q. Yes?

A. No, sir. You don't explode that electric detonator with a spark, nor do you explode the fuse cap. You explode it with a flame, from the fuse flame. You heat up the bridge to red or white heat and then it explodes.

1187 Q. When it is shot, usually these two ends are attached to the longer wire and they have a blasting machine which they push the handle down on and that kicks off the detonator?

A. Not necessarily, no.

1188 Q. How do they usually do?

A. They can shoot it with dry cells or current.

1189 Q. Then the electric spark goes through the detonator?

A. It heats the bridge to white heat and that in turn ignites the fulminate.

1190 Q. Now then the contents of that you say is fulminate of mercury?

A. I do not know for sure as it was, or what it was because——

1191 Q. Didn't you say it was fulminate of mercury?

A. I said the explosive charge.

1192 Q. The explosive charge?

A. Yes, sir.

1193 Q. Is it always fulminate of mercury?

A. No.

1194 Q. What else do they use?

215 A. Many different compounds.

1195 Q. What?

A. They use tetryl.

1196 Q. What is that?

A. Tetryl is tri-nitro, menthyl, analine.

1197 Q. That is what they use to kick it in with?

A. I do not know. I have seen that in it usually with these blasting caps. The only reason they use it is because there was a shortage of fulminate, because I heard it expressed as the opinion of men competent to say——

1198 Q. Did you ever make a practical demonstration with this yourself to see whether or not—to compare them with the other cap?

A. Yes, sir.

1199 Q. What did you find?

A. Varying conditions, and under different conditions, what we call lead block tests, but without the records I would not attempt to answer in detail.

1200 Q. You also use trotyl?

A. Is not that an abbreviation for something?



1261 Q. Yes?

A. What is it?

1202 Q. It is tri-nitro menthyl analine?

A. You did not ask me what trotyl was. You asked for some other name.

1203 Q. What is tri-nitro toluene. Did you ever see that used?

A. I am not a chemist.

1204 Q. Is it not a fact the purpose of using a detonator is to start some high explosive?

A. Yes.

216 1205 Q. And by high explosive we mean high explosive compound?

A. Any detonating explosive, of the second order. Some explosive such as black powder you can connect from the ordinary fuse, but any detonating explosive.

1206 Q. What I want is explosive compounds as distinguished from explosive mixture. All explosive compounds are—

A. The difference between explosive compounds and explosive mixture?

1207 Q. What is the difference between explosive compound and explosive mixture?

A. It is the same thing. Any explosive compound must be an explosive mixture or it would not be explosive.

1208 Q. Explosive mixture is a mixture that is susceptible of mechanical—being mechanically divided up into its component parts?

A. Can't anything be divided up into its component parts? What can't be? I would say that the explosive mixture and the explosive compound could both be divided up by chemists into their component compounds.

1209 Q. Is not an explosive compound something where two elements are used and then form a new and separate element?

A. Well possibly your chemical knowledge would qualify you to put that question, but I am not able to answer it.

1210 Q. You are not qualified to answer?

A. No, sir.

1211 Q. It is used to explode high explosives?

A. It is used for detonating high explosives?

1212 Q. Now, is it not a fact that fulminate of mercury that is placed in this cap is the most explosive, or the most sensitive explosive that is permitted to be shipped on the railroad on this country?

217 A. I would not attempt to answer it. There are representatives of the railroad companies who know. I do not know.

1213 Q. Do you know of any more sensitive explosive than that on the market that is used commercially?

A. We don't sell it commercially, sir.

1214 Q. It is shipped?

A. We ship mercury and fulminate of mercury, but it is in the wet state.



1215 Q. I will ask you if the contents of that cap is not the most sensitive explosive that is shipped commercially?

A. I would not attempt to say because I do not know.

1216 Q. Do y<sup>e</sup>/Mu know of any that is more sensitive that is shipped commercially?

A. I do not know either one way or the other.

1217 Q. You sell it?

A. We do not sell fulminate of mercury except in that state in the capsules.

1218 Q. The only added danger there is between fuse and—the ordinary detonator as you term it is the danger of sparks or a pin or something else falling down in the cap and touching the fulminate?

A. That is the only danger, that is all the danger.

1219 Q. Is not that the added danger of its being exposed?

A. Yes, it is, that is the real danger of it.

1220 Q. If you would take this cap and tap it like that would not there be some danger in doing it (indicating)?

A. There would not be any danger in tapping it like that.

1221 Q. There would not?

A. No.

218 1222 Q. I will ask you if there would be any more danger one from the other?

A. I would not say there would be.

1223 Q. Both would have the same amount of shock delivered to the colded end?

A. I do not see any reason why one would not be as sensitive as the other in that respect.

1224 Q. Are you familiar with a government bulletin entitled "A primer on Explosives for metal miners and quarrymen, published by the government, published by Charles E. Monroe"?

A. I read all their bulletins. I have read all of their bulletins.

1225 Q. That author states that electric detonators are simply ordinary detonators that have been fitted with a means of firing them by the electric current. Is not that true?

A. That is the most concise way of impressing it on the layman, the similarity. There is no great difference between them. You might infer that there was some radical change, but that primarily is the same as every bulletin to reach the laymen.

Q. You are a layman?

A. Not on an explosive question, no, sir, I am an expert.

1226 Q. I thought you said you qualified as an expert?

A. I cannot on ordnance.

1227 Q. Or chemistry?

A. I am not a chemist.

1228 Q. That is the only difference, however; that statement is true as I understand it, you and I?

A. They say there that it is, yes.

1229 Q. On page 39 of this government bulletin the author says:

219 "In the description of mercury fulminate attention was called to its extreme sensitiveness to heat, friction, or blows, and to the extreme violence of its explosion;" is that true?

A. That is meant to impress upon the——

1230 Q. Is that a true statement?

A. They say it is.

1231 Q. Haven't you found it true in your experience?

A. They say that it is there, and they respect it as a high explosive, and they treat it accordingly. Any explosive——

1232 Q. They say, continuing: All these properties therefore belong to detonators and electric detonators, and these devices should be treated with the utmost respect." That is true?

A. That should be promulgated amongst the trade in order to promote the highest degree of care.

1233 Q. What do you think of this (continuing): "Never attempt to pick out any of the composition?"

A. No, nobody should pick it out.

1234 Q. If you dropped cigar ashes on fulminate of mercury, or if you scratched fulminate of mercury with a pin?

A. You cannot scratch it in that.

1235 Q. Suppose you take fulminate of mercury and scratch it with a pin?

A. In what form?

1236 Q. In the same form?

A. In the same cap?

1237 Q. Yes?

A. Why, you cannot scratch it in there.

1238 Q. Suppose you can?

A. I cannot conceive of how you can think of such a thing without breaking the cylinder. That is ridiculous.

1239 Q. You testified that in the ordinary detonator there is danger?

A. Yes.

1240 Q. Can't you scratch it with a pin?

A. Yes, but you can't get into it.

1241 Q. I mean in an open detonator?

A. Yes, in an open detonator.

1242 Q. What do you think of scratching it with a pin?

A. I would not do it.

1243 Q. (Continuing reading from pg. 39:) "Do not drop them or strike them violently against any hard body." "Do not lay them on the ground where they may be stepped on. Do not step on them. In crimping take the greatest care not to squeeze the composition, and never crimp with the teeth for there is enough composition in one of these small capsules to blow a man's head open"?

A. It must be so. It is there. I do not see why it should not be.

Witness excused.

- 221 A. E. ANDERSON, called as a witness in behalf of the defendant being first duly sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

1244 Q. State your name?

A. A. E. Anderson.

1245 Q. Where do you live?

A. In Denver, Colorado.

1246 Q. What is your occupation?

A. I am technical representative for the Dupont Powder Company.

1247 Q. Please state what experience if any you have had in handling explosives?

A. I handled explosives in the mining business as a mining engineer and practical mining operations for four or five years, and I have handled all kinds of mining operations for the last 15 years for the Dupont Powder Company. I have had mining experience since 1900.

1248 Q. Are you familiar with the electric blasting caps?

A. Yes, sir.

1249 Q. Are you familiar with the ordinary blasting cap that is discharged by fuse?

A. Yes, sir.

1250 Q. Have you seen the electric blasting caps used?

A. Yes, sir.

1251 Q. What are they used for?

1252 Q. They are used to detonate charges of high explosives—all kinds of explosives.

1253 Q. And by what people are they used, and in what business?

A. It is used by people who do blasting and mining, and in agricultural operations, and various kinds of railroad and road building, wherever they use explosives.

1254 Q. I will ask you to look at Exhibit 20 and state what it is?

A. That is an electric blasting cap that has been exploded.

1255. Mr. McGaw: The defendant offers in evidence Exhibit 20, being exploded electric cap with wire attached.

There being no objection Exhibit 20 is received in evidence, is shown to the jury, and here follows:

**Exhibit 20 (Exploded Elec. Cap).**

223 [NOTE.—Exhibit 20 to Anderson's testimony, being physical exhibit of exploded cap & wire, omitted in printing.]

224 1256 Q. Are electric blasting caps used in mining?

A. Yes, sir.

1257 Q. Have you seen them used? yourself?

A. Yes, sir.

1258 Q. Did you ever use them?

A. Yes, sir.

1259 Q. Is an electric blasting cap liable to be exploded by an ordinary blow?

A. It takes considerable blow to explode one.

1260 Q. Would it take a blow sufficient to make a dent in the shell?

A. Yes, sir.

1261 Q. What would you say as to the possibility of an electric blasting cap being exploded by such a blow as it would receive by being struck against a railroad rail in the following manner: suppose a party had hold of the cap in his left hand, and that there was five or six inches of wire attached to the cap, and that he had hold of the wire with his right hand, pulling on the wire with his right hand while holding the cap with his left hand for the purpose of straightening the wire, and that the cap should slip out of his left hand, and the right hand would swing around and strike the cap against the railroad rail upon which the party was sitting?

1262. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and not a proper hypothetical question and not containing the proper elements of this case.

The objection is overruled.

To which the plaintiff excepts.

A. I would say it would not explode.

1263 Q. Explain to the jury how electric blasting caps are handled by men in their practical use?

1264. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and simply cross examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

A. These blasting caps are extracted from the paper cartons in which they are packed with the wires folded by the factory in such a way that when the ends are unwrapped, the one or two wraps which they are given by the factory, the folds naturally fall apart, and in the short wires, in the short exploders they usually grasp the exploder in one hand and the end of the wire in the other and pull them apart. Sometimes they flap them apart on the longer wires, or whip them apart.

1265 Q. Is any particular care taken or used that they don't strike rails or hard substances when being whipped out in that manner?

1266. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and simply cross examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

A. They seldom use much care in the handling of them.

1267 Q. Did you ever know of an electric blasting cap being exploded by striking a stone, or railroad rail in the manner I have described?

1268. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and cross examination of his own witness.

226 The objection is overruled.  
To which the plaintiff excepts.

A. I never have.

1269 Q. Mr. Anderson, suppose that a man would find an electric blasting cap with the wires attached thereto, and desiring to take the wires off of the cap would twist them, hoping to break them by twisting, but failing in that he would subsequently take a hammer and cut the wires off five or six inches from the cap, would the handling of the cap in that manner have a tendency to make it more explosive than it would be if it has not been so treated, or handled?

1270. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question.

The objection is overruled.  
To which the plaintiff excepts.

A. It would not.

1271 Q. Would the fact that such an electric blasting cap had been laying for some indefinite time in a coal car where it was exposed to weather, rain and sun, and so forth, have a tendency to make it more sensitive, or more easily exploded than it would otherwise be?

1272. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question.

The objection is overruled.  
To which the plaintiff excepts.

A. It would not.

1273 Q. What will cause an electric blasting cap to explode?

227 A. It can be exploded by putting an electric current through the cap—through the wires or by heating it, or a blow with a hammer or other similar instrument.

1274 Q. The ordinary blasting cap, one that is used with a fuse, is similar to the electric blasting cap with the exception that the wire—the plug is not present in the ordinary cap?

A. The electric blasting cap has—is the same as the common blasting cap with the addition of the wires and the plug which holds the wires in position, and an asphaltum compound which is poured while liquid around the plug, and then molten sulphur is poured on top of that to seal the shell.

1275 Q. Is there any danger in handling the electric blasting cap in your hands?

1276. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial.

The objection is overruled.  
To which the plaintiff excepts.

A. No, there is not.

1277 Q. Is the heat of the hand sufficient to explode one?

A. No, sir.

1278 Q. Is the ordinary pressure that would be given them by the hand in handling them liable to explode it?

A. No, sir, no, indeed.

1279 Q. Would pulling on the wires explode it?

A. Not any ordinary pulling. I have had some very extreme pulling that was made.

1280 Q. What would have to take place by pulling on the wire in order to explode the cap?

A. It would have to be pulled with sufficient force to jerk the ends of the wires and pull the wires out of the shell and cause sufficient friction in coming out to explode the fulminate, that is friction with the fulminate or with the side of the shell in contact with the fulminate.

1281 Q. Are these wires fastened in securely?

A. Very securely, yes, sir.

1282 Q. Would it take a strong man to pull one out, holding it in his hands?

A. He could not do it with a steady pull. If he could exert enough force with a steady pull to pull it out, there is very little probability of it exploding. It would have to be a terrific jerk, practically all the force that a man could exert.

#### Cross-examination.

#### Questions by Mr. John O. Yeiser:

1283 Q. What is the object of covering this cap so securely between the fulminate of mercury and the open end?

A. There are several reasons for that. The first reason is to keep the platinum bridge of the wire in place. The platinum bridge is a fine wire which joins the two ends of the wire inside of the capsule.

1284 Q. That is a very fine wire?

A. Yes, about as fine as the hair on your head, and another object—

1285 Q. It is very sensitive?

A. In what way?

1286 Q. To conduct electric current?

229 A. Very little current of electricity will heat it to a high degree of heat.

1287 Q. A little spark will do it, will heat it?

A. A spark would not heat the wire.

1288 Q. It would heat the resistance—the fulminate?

A. No, a spark would not heat the wire.

1289 Q. An electric spark would start it?

A. An electric current would; about one emphere and one volt will heat it sufficiently to white heat would, but to complete the other part of your question. The other objects of this filling material is to keep out moisture and to make the cap safer to handle.

1290 Q. And it is to keep ashes from dropping in and sharp instruments from reaching it?

A. Yes, that is one object.

1291 Q. Still they might get in some way and must be warded off by this protection?

A. Yes, sir.

1292 Q. Another thing, have you ever found—manufacturers have sometimes, where they put them up too sensitive so that the government has had to have inspectors condemn them and prevent the sale of supersensitive caps?

A. There is no way in which an electric blasting cap can be manufactured to make it supersensitive unless they use some other compound in it which was supersensitive.

1293 Q. They sometimes put in different compounds and slip them through and sell them?

A. No, there is no chance for that.

230 1294 Q. What is the use of the inspector, what are his duties?

A. Which gentleman do you speak of?

1295 Q. Mr. Beistle?

A. He knows his duties better than I do.

1296 Q. You know he is an inspector?

A. He is as I understood it chief chemist for the Bureau of Explosives.

1297 Q. But does not the bureau of explosives supervise the sales to protect the miners, and other commercial interests, and to protect their sales?

A. No, he don't supervise the sales as far as I know.

1298 Q. Their duties are to supervise the shipment and to prevent supersensitive caps that are not manufacture- with the right contents, is not that it?

A. All the explosive materials that are manufactured are tested by them, and if they are supersensitive they will not allow them to be shipped.

1299 Q. Sometimes they are manufactured and get out and they want to prevent that, is not that it?

A. People sometimes attempt to manufacture them.

1300 Q. If they do explode they are very dangerous? are they not, any of them?

A. Yes, sir.

1301 Q. Can you give me the power of these explosives, any of these caps, such as we mention?

A. That is pretty hard to—you cannot get it in pounds per square inch, or any such thing. The only way we can measure it accurately is to bore a hole in a lead block, and explode one of these in a lead block, then we measure the cavity in that lead block.

231 1302 Q. Have you exploded them less than two feet from a lead block and had the cap bury itself in the block?

A. They make one test where they point the closed end of the cap into the lead plate, and with certain types of caps the end of the cap will perforate the plate.



1303 Q. From its free exposure?

A. Yes, sir.

1304 Q. It will blow into that?

A. Yes, sir.

1305 Q. And particles of this jacket will fly 25 or 30 feet away?

A. Occasionally, yes, sir.

1306 Q. Have you no knowledge of what the force is exerted on that jacket by the explosion, in pounds pressure on that jacket?

A. No, I have not.

1307 Q. Can you estimate it?

A. No, I could not estimate it. We have no way of measuring it.

1308 Q. Can you compare it with the ordinary 32 cartridge?

A. No, I do not believe I can.

1309 Q. Well, you know it is many times greater, is it not?

A. It is a different kind of force entirely. A 32 cartridge has a propellant explosive, and this is a different type of explosive. This is a different explosive.

1310 Q. Is it in every direction?

A. The force is equal in all directions.

1311 Q. Now sometimes these caps do what they are not intended to do?

A. I do not know what you mean.

1312 Q. Do you remember of some party having a box of them out here in Nebraska, and it blew up the whole thing?

A. I never heard of that case, and I don't know what you mean by the whole thing.

1313 Q. You never saw one of them go off?

A. Yes, I have seen a great many go off.

1314 Q. I mean unintentionally?

A. No, I do not believe I ever did.

1315 Q. You do not do the blasting yourself?

A. I do sometimes, yes, sir.

1316 Q. Very little as you are the engineer in charge?

A. I generally go around the places myself.

1317 Q. Did you ever see a dead white mule? They do die too, don't they?

A. I don't remember whether I have or not to tell you the truth.

1318 Q. How many cases have you seen and have come under your direct observation where these detonators went off unintentionally?

A. I believe I stated I had never seen any.

1319 Q. How many have you heard of yourself?

A. Where they have gone off accidentally?

1320 Q. Yes.

A. Well, the one that is impressed on my mind most forcibly is one case where one exploded behind my back accidentally within two feet.

1321 Q. Do you know how it came to explode?

A. Yes, sir.



1322 Q. *State that experience?*

A. I was testing the use of two dry cells, ordinary dry cells used in telephones, for exploding caps, and I had these caps  
233 planted behind me in the ground with a wire attached to them, and I think I had three connected in a series. I touched the two opposite terminals of these batteries, and I think two of the caps exploded and the third one failed. I threw aside the wires and turned around to connect the cap that had failed to explode—the electric blasting cap, and these two wires accidentally flapped back and touched the two opposite terminals of the batteries and the cap exploded, but I did not see it because it was behind my back.

1323 Q. What other explosives are used besides fulminate of mercury?

A. There are a very large number of explosives used.

1324 Q. Will you name some of them?

A. Dynamite, black powder, tetryl, picric acid.

1325 Q. How is Picric acid exploded?

A. By means of an electric blasting cap, or a common blasting cap of large size.

1326 Q. What is the most sensitive explosive you know of that is used?

A. You mean that is in commercial use?

1327 Q. Yes?

A. Well, that is difficult to say. It probably would be either liquid nitro glycerine or fulminate of mercury, one of the two.

1328 Q. Liquid nitro-glycerine will explode from a jar?

A. Yes, sufficient jar.

1329 Q. Have you ever known it to be used in compound with other explosives?

A. Yes.

1330 Q. Is it not sometimes absorbed—it is used with some absorbent?

234 A. Yes, sir.

1331 Q. It might be sawdust?

A. The ordinary absorbent for liquid nitroglycerine is wood material.

1332 Q. You can use ashes?

A. I doubt if ashes has much absorbing power. It is not in practical use.

1333 Q. The other is better?

A. Yes.

1334 Q. They sometimes use it commercially—

A. It is about the same—the same as what?

1335 Q. As any liquid form?

A. Well, of course the more absorbent you use the more you reduce the power of the liquid.

1336 Q. Heat, hot sunshine has some influence in rendering we will say fulminate of mercury a little more sensitive than it would be if it was cold?

A. I do not believe it, no.

1337 Q. What?

A. I do not think so.

1338 Q. When you get up heat enough it will explode?

A. Well, if you get it hot enough.

1339 Q. If you get it heated, or the more you heat it the more sensitive it will be?

A. You have to have the heat at least as hot as an open flame, an open spark.

1340 Q. As you approach that point of the hot sunshine does it not render it more sensitive than if it were freezing?

235 A. No, I do not think it affects it.

1341 Q. Does it not make it more explosive, say if it is up to 200 degrees—more than it was before?

A. It is always explosive, but it takes—

1342 Q. It is always?

A. It takes a certain amount of heat to explode it.

1343 Q. In your experience as a mining engineer you do not pay any attention to any caution about not exposing it to heat?

A. Not exposing to what heat? exposing what?

1344 Q. These caps or detonators?

A. Well, I do not expose them to heat until I am ready to explode them.

1345 Q. You would not advise that. Now then if the cap may have been unskillfully put together, and if it had been twisted and pulled and jerked, may that have added any weakness to the cap so that something else might put it off?

A. No.

1346 Q. That would not make any difference?

A. No.

1347 Q. An ordinary blow would not put it off, would it?

A. It depends on what you mean by an ordinary blow.

1348 Q. Suppose I go down in my satchel and give you a real cap, a commercial one, would you put it on a cane and swing it around your head and have it strike an iron beam to test it?

A. You mean an electric blasting cap?

1349 Q. Yes?

A. I might for experimental purposes, yes, sir.

1350 Q. Would any ordinary consideration induce — to do it?

A. What do you mean by ordinary consideration?

236 1351 Q. Would you do it simply to convince this jury?

A. I would do it in such a way that everybody would be protected.

1352 Q. You want everybody protected before you do it? or try it?

A. Yes, sir.

1353 Q. You want a little protection for yourself?

A. Yes, sir.

1354 Q. Why would you want protection, because it might go off?

A. Just as a matter of protection.

1355 Q. A great many of them don't go off, but once in a while you explode them?

A. It depends on how rough the treatment is.

1356 Q. Now then suppose a man picked one up and cracked it with a hammer would it explode?

A. If he hit the capsule?

1357 Q. Yes?

A. If he hit the loaded end with sufficient force, and it was resting on something it would go off, yes, sir.

1358 Q. What would you call sufficient force?

A. Sufficient force to put it off.

1359 Q. What would be sufficient force to put it off? how far would you drop the hammer?

A. I never tried it. The ordinary blow that you would give a nail, if the cap was laying on a metal would let it off.

1360 Q. A rock?

A. If the hit was hard enough.

1361 Q. How hard would you have to hit it on a rock?

A. That is something that cannot be measured so I cannot say definitely.

237 1362 Q. You are not qualified to say what strength or what kind of a blow would do it?

A. No.

1363 Q. You never undertook to find out, did you?

A. No.

1364 Q. You use every precaution in managing it?

A. I use ordinary precaution in handling it.

1365 Q. Your work has been that of an engineer in following the rules laid down?

A. No, I do a great deal to investigate these rules and in fact to help promulgate them. I work the rules out.

1366 Q. What rules have you promulgated?

A. We promulgated all the rules of safety. In fact we make the rules extreme so that there is no possibility of danger in any way.

1367 Q. You do that because that is such a dangerous article, they must be very careful about it?

A. All explosives are dangerous.

1368 Q. Is that required where the rules have been promulgated?

A. Practically all over the United States.

1369 Q. You heard the rules read from one of the government publications here. Are those the rules you refer to?

A. Yes, some of them.

1370 Q. Those are the universal rules that govern the handling of these detonators?

A. Yes.

1371 Q. And these rules are based upon reason, are they not?

A. Yes, sir.

1372 Q. The detonator is much more sensitive than dynamite?

238 A. In some ways. In other ways it is not.

1373 Q. And dynamite is regarded as safe for an experienced man to handle, is not that true?

A. It is reasonably safe to handle if he handles it with care and

observes the rules on it. The rules are made extreme in all these things so as to make it safe, in other words they are fool proof rules.

1374 Q. I very frequently hear of where dynamite is exploded?

A. Yes.

1375 Q. Where not intended?

A. Yes.

1376 Q. And these fulminate of mercury caps are much more sensitive than dynamite?

A. They are in some ways, but it depends on what kind of dynamite you are speaking of.

1377 Q. Tell me then about fulminate of mercury?

A. How is it?

1378 Q. Is it more sensitive than dynamite.

A. What kind of dynamite?

1379 Q. Well we will take 80 per cent?

A. Well, there is no straight; there is a certain formula.

1380 Q. Then jelly?

A. There is 80 per cent gelatin dynamite, and there is 40 per cent strength.

1381 Q. Take it straight?

A. Do you refer to fulminate of mercury in its free state or when it is confined in the cap?

1382 Q. In its free state?

A. In its free state and dry it is very sensitive to shock, heat and friction.

1393 Q. Shock and friction?

A. Heat and friction. Of course in the cap it is protected by the shell.

1384 Q. But if anybody should happen to interfere with that protection then it is subject to the same sensitiveness as before it was so protected?

A. You mean if the shell is removed?

1385 Q. Yes?

A. Yes.

1386 Q. If it could be reached?

A. Yes, sir.

Witness excused.

240 C. P. BEISTLE, called as a witness in behalf of the defendant, having been heretofore sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

1387 Q. You were sworn this morning?

A. Yes, sir.

1388 Q. Where do you live?

A. I live at Freehold, New Jersey.

1389 Q. What is your business?

A. Chief chemist for the Bureau of Explosives.

1390 Q. Where are your headquarters?

A. My laboratory is at South Amboy, New Jersey.

1391 Q. How long have you held that position?

A. 15 years.

1392 Q. Have you had experience in handling explosives?

A. Yes, sir, I have.

1393 Q. State what experience you have had?

A. Well, for six years I was part of the time assistant chemist, for the Bureau of Ordnance of the War Department, and then for the past 15 years I have been chemist and chief chemist for the bureau of explosives.

1394 Q. During the time you were in the Ordnance Department you were with the Government?

A. Yes, I was with the Government then, all the time in the war department.

1395 Q. What were your duties while you were with the War Department?

A. In the War Department my duties were testing of smokeless powder, and ingredients for smokeless powder, and for military high explosives, and that sort of thing.

1396 Q. Are you familiar with fulminate of mercury?

241 A. Yes, sir.

1397 Q. Is that an explosive?

A. Yes, sir.

1398 Q. And are you familiar with the ordinary electric blasting cap?

A. Yes, sir.

1399 Q. Such as we are talking about in this law suit?

A. Yes, sir.

1400 Q. You may tell the jury how they are made.

A. Well, I have not had much experience. I never made any of them. I know what they are made up of. I know the composition.

1401 Q. That is what I mean.

A. The regular blasting cap consists of a copper tube about a quarter of an inch in diameter and the usual size, the ordinary size is about an inch and a half long, and in the bottom of the copper tube there is about 15 grains of fulminate of mercury, and about 9/10ths of this is compressed to a solid mass in the bottom of the tube, and there is a small amount of loose fulminate placed on top of that, or it may be gun cotton in the loose form, and over this small amount of loose fulminate or gun cotton there is a small, what we call a bridge, it is a very fine platinum wire connecting the ends of the two wires that are run down into the tube through the open end, and these two wires pass through a composition plug, something like asphaltum, and this asphaltum plug sets on the loose fulminate, and through it pass these two wires in such a manner that they will not touch, and on top of this asphaltum plug there is a sulphur plug poured in on the material while it is hot so that as it cools it sets and seals the top of the cap so no moisture can penetrate, and

242 these wires are inserted in this solid form of composition so that they are not easily taken out in rough handling.

1402 Q. Have you had experience in handling these electric blasting caps?

A. Yes, sir. I have used many of them.

1403 Q. Have you made tests to determine the extent of blow that is required to explode them when a blow is directed on the loaded end of the shell?

A. I made some tests to see how much they would stand in rough handling. I took electric blasting caps and laid them on a concrete base in a horizontal position, and I had a machine, an apparatus, which consists of two upright steel bars, which rest on this concrete, and between these two bars there was a weight that slid up and down, and right immediately over this cap, horizontal cap I placed a nail. The nail was two-tenths of an inch in diameter, and instead of having a point, I filed it down to a wedge shape edge, and this wedge shape edge was a little bit rounded, and that would bear directly on the cap, and then I dropped a two pound weight through these guides so that it hit the top of the nail, and of course that communicated the impact directly to the cap. The first two caps I tried I dropped this two pound weight five inches, and each of these, I produced an indentation into the wall of the cap, but it did not cause the cap to explode. Then I took two more caps and I made the same test by dropping the weight six inches, and it produced an indentation into the wall of the cap but it did not cause an explosion. Then I took another cap and I made the same test and dropped the weight

243 eight inches, and it made a deeper indentation. In all these tests the chiseled edge rested on the end of the electric blasting cap that contains the explosive. Well I continued until I made five tests, and the last test where the weight dropped the most it punctured the wall of the cap so that you could see the fulminate of mercury, the gray contents of the cap exposed slightly, and in none of those five tests would the cap explode, although there was sufficient force in one case to break the shell, and in every case to make a particular notic-able indentation. The indentation—the *topt* of them was about one-third of the diamater of the cap itself.

1403½ Q. Did you make any tests of shells or caps to see whether they were loaded or not?

A. Yes, sir. I took one or two of these caps and passed the electric current through them so as to be sure that they were real live blasting caps, and they exploded in the usual manner, when the current was passed through them.

1404 Q. I now hand you Exhibit 14 and state whether or not that is a picture of the appulance you used in making the tests to which you just referred?

(Handing the witness Exhibit 14.)

A. Yes, sir. That is a photograph of the apparatus I used.

1405. Mr. Magaw: The defendant offers in evidence this testing apparatus picture marked Exhibit 14.

1406. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and purely cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

Exhibit 14 was then shown to the jury, and here follows:

(Here follows Exhibit 14 to Beistle's Testimony, marked side folio page 244.)

245      1408 Q. I now hand you the pictures marked Exhibits 15, 16 and 17, being three different photographs and I will ask you to state what they show, explain them to us?

1409. (Handing the witness said pictures.)

1410. Mr. Yeiser: Objected to by the plaintiff as being incompetent, and irrelevant and immaterial and cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

A. Exhibit 15 is a photograph of four of those caps after they were—after they had been put through this test I spoke of, showing the indentation into the side of the cap. Exhibit Number 16 is a photograph of a cap after it had been exploded by the electrical current, and Exhibit 17 is a photograph of the fifth one of those caps where the deepest indentation was made in it showing to the eight inch fall, and it is a deeper indentation than the other four as I explained.

1411. Mr. Magaw: The defendant offers in evidence this picture—just identified by the witness and marked Exhibits 15, 16, and 17.

1412. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

1413. Exhibits 15, 16 and 17 are shown to the jury and here follow:

(Here follow Exhibits 15, 16, and 17 to Beistle's Testimony, marked side folio, page 246.)

247      1415 Q. You may now look at Exhibit 18 and state whether or not that is a correct picture of one of these caps that were submitted to the test to which you have just referred?

1416. (Handing the witness Exhibit 18, picture.)

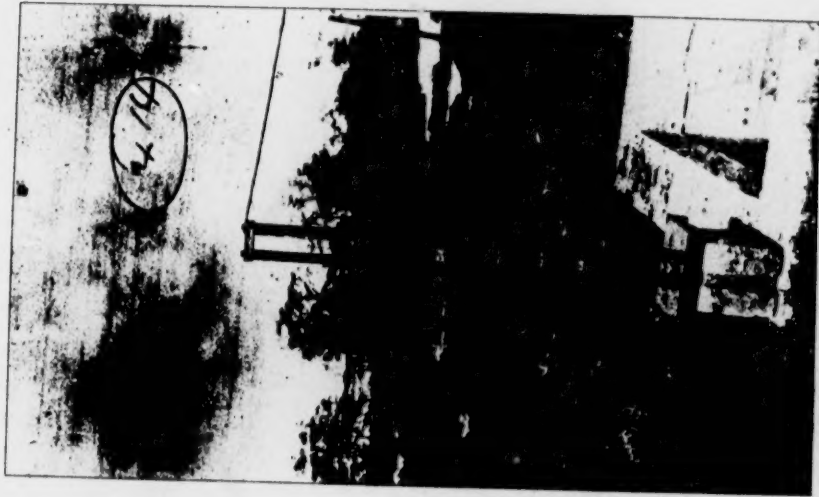
A. Yes, that is a picture. I do not know which one, but it has an indentation in it. It is one of my tests.

Mr. Magaw: The defendant offers in evidence Exhibit 18.

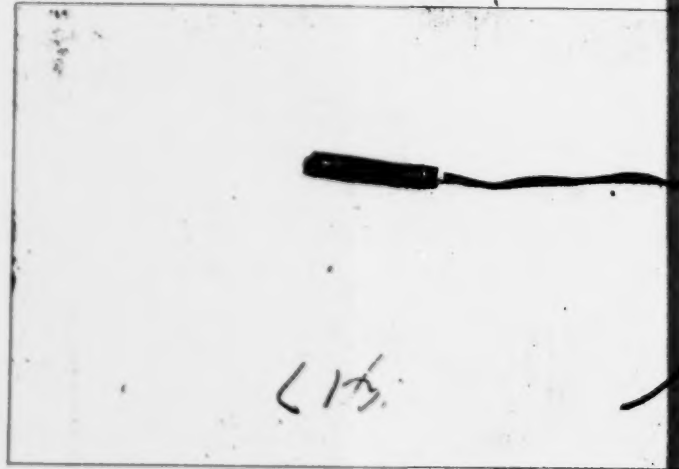
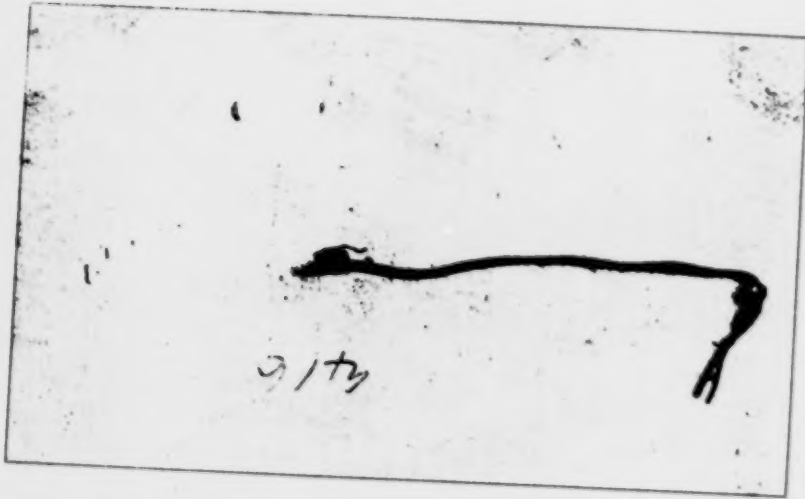
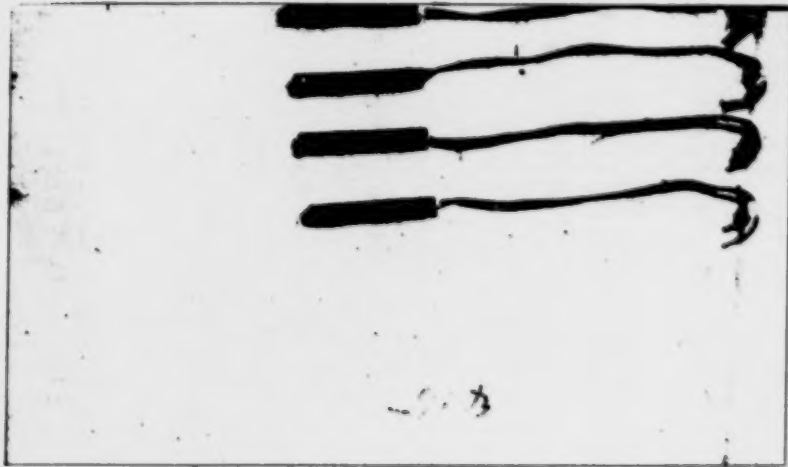




✓ Exhibit 14 to Beattie's testimony



✓ Exhibits 15, 16 & 17 to Bristol's testimony



✓ Exhibit 18 & Beattie's testimony





1417. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

Exhibit 18 is then shown to the jury and here follows:

(Here follows Exhibit 18 to Beistle's Testimony, marked side folio page 248.)

249 1419 Q. Now, have you made any other tests with these blasting caps, Mr. Beistle?

A. Well, some years ago I made some tests at *Sompton Lakes*, New Jersey, and we took some of these electric blasting caps that were packed ready for transportation, and we took a box up on top of a cliff and just threw the whole box over, and it fell down about forty feet and struck the rocks on the bottom and broke the wooden box all to pieces and some of the paste board cartons; or inside boxes were broken open, and *and* many of the caps came out but none were exploded.

1420 Q. Mr. Beistle, supposing a man sitting on a railroad rail has an electric blasting cap in his left hand to which there are about four, or five or six inches of wire still attached and he has hold of the wire that is still attached to the cap with his right hand and is pulling on it, straightening the wire, and the cap slips out of the left hand, and the wire and cap whip around so that the cap strikes on the rail, would such a blow as that cap would thereby receive in your opinion be sufficient to explode it?

1421. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial, and not proper examination, and not in proper form, and not a proper impeachment question.

The objection is overruled.

To which the plaintiff excepts.

A. I think it would not explode, in my opinion.

1422 Q. Have you seen these caps subjected to such blows as that?

A. Yes, I have tried some.

1423 Q. What?

250 A. I tried some by swinging them around the corner of a concrete building, and it was a good deal more violently than that and they did not do anything.

1424. Mr. Yeiser: I move to strike the answer as not responsive.

The motion is overruled.

To which the plaintiff excepts.

1425 Q. Supposing one of these electric caps with the wire attached to it had been in an open coal car in hot weather, and sub-

jected to the elements including sunshine and rain would such an exposure as that have a tendency to make it more liable, or more likely to explode?

1426 Q. Suppose that a party would endeavor to twist the wire off of the cap and in doing so would loosen up the end so that the sulphur would run out, finally being unable to twist the wire off he would cut off both wires to within four to six inches of the cap by laying the wire on a railroad rail and striking them with a hammer and in that way severing them, would such treatment as that make the cap more likely to explode while handling it?

1427. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and cross-examination of his own witness, and not proper impeaching question.

The objection is overruled.

To which the plaintiff excepts.

A. No, it would not make any difference.

1428 Q. Why would it not? Explain it.

1429. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

A. The fulminate of mercury would still be in there unchanged and it would be no more sensitive or lose than before. It would not change it any.

1430 Q. In other words as long as the wire remained in the shell the mercury would still be protected by the plug to which you have referred?

1431. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and cross-examination of his own witness.

The objection is overruled.

To which the plaintiff excepts.

A. It would still be protected there, yes, sir.

Cross-examination.

Questions by Mr. John O. Yeiser:

1432 Q. Mr. Beistle, referring to these tests where these caps are thrown out, does that mean just a little bit of a tap where it accidentally strikes a rail or hard substance, or does it mean a good strong severe blow?

A. I do not believe you can throw one hard enough in that, that way to set it off. It would be very unlikely.

1433 Q. Where you have exhibited these pictures of nails that have been driven in, did that indent take place where the fulminate of mercury was?

A. Yes, sir.

1434 Q. Now then, Mr. Beistle, would it in your opinion be probable for a person, where the end had been opened a little, so that the yellow powder exposed itself or run out a little, to tap that on a rail, would that explode it sooner than otherwise?

A. The knocking out of the sulphur would not have any effect on it.

252 1435 Q. That little tap would not do it?

A. No.

1436 Q. If a detonator exploded something caused it, did it not?

A. Yes, sir.

1437 Q. Now, Mr. Beistle, how many different kinds of detonators do you know of?

A. Well, there are two common kinds of commercial blasting caps, the ordinary blasting cap and the electric blasting cap. Those are the two common kinds.

1438 Q. How many different kinds of explosives are used in these two types?

A. I do not know how many kinds are used now. Most of them are made with the fulminate and there have been some made with tri-nitro-menthol-aniline, in connection with the fulminate, and some with tri-nitro-toluene in connection with fulminate but they were not generally speaking so successful.

1439 Q. Some were put out?

A. Yes.

1440 Q. Commercially?

A. I think so.

1441 Q. Why were they not a success?

A. That is a matter regarding which the manufacturers could inform you more explicitly than I can.

1442 Q. How many different manufacturers are there?

A. There are three in this country, that I know of.

1443 Q. Who are they?

A. The Dupont, the California Cap Works and then there is a company in Illinois.

1444 Q. How about the Buckeye, are they still going?

253 A. I do not know whether they are or not I think that was part of the Artria concern. I think it is not operating but I am not certain.

1445 Q. These caps may have been manufactured a good many years ago and they would still be subject to inspection, would they not?

A. Yes, they would last a long time.

1446 Q. A great many tears?

A. Yes, sir.

1447 Q. How many manufacturers ten years ago existed?

A. I do not know The Buckeye Company as I understand it used to purchase their caps and loaded shell from the Dupont Company

and then put the electrical connection in so they were using the same composition.

1448 Q. Yes, that is before they brought the big suit against the Dupont people?

A. I do not know anything about that. That is more or less hear say.

1449 Q. It went to the Supreme Court of the United States? How many did you say were now?

A. I have given the three. There may be more.

1450 Q. Now, you could not undertake to say how many different kinds of detonators in shells similar to this had been put on the market at any time within the previous ten years, or time such as would be within the life of the detonator?

A. No, I could not say definitely every one that possibly was put on.

1451 Q. Do you not find that particular specimens are really more sensitive than others?

A. The main trouble with detonators, when there is  
254 trouble, is not that they are too sensitive, it is that they have failed to go off; there is more defect in the manufacture of them that way. I believe there have been one or two types that were that they would not admit them to be shipped owing to their composition in one case, and the mechanical construction in another case.

1452 Q. And if they should happen to go off on a slight tap or a blow that would be an indication to you that it had been defectively constructed, would it not?

A. No, I cannot say that it would because you cannot get fulminate of mercury any more sensitive than it naturally is.

1453 Q. Your opinion would be that there was no cap there to explode, would you? in such a manner as spoken of?

A. I do not think that it—

1454 Q. Either the tap or striking?

A. If you strike it hard enough you can set it off, of course.

1455 Q. If it came down hard enough?

A. Yes, sir. But I do not think that the swing you would give it accidentally with a five inch wire could possibly set it off.

1456 Q. You do not think as a general rule it might, but it might, might it not?

A. I do not think it would.

1457 Q. If there was nothing else excepting the tap or the swing it would not go off, is that it?

A. That is my judgment.

1458 Q. But what would you say if there was nothing but those two things and that did happen, and it did go off?

A. Of course if those were all the conditions, and none were excluded and if it went off they set it off.

255 1459 Q. If there were no other causes excepting those two causes, the tapping and the striking it with the wire spoken of, which would you say struck it off, in your opinion?

A. The tapping it.



1460 Q. With the fingers, tapping it on the rail and the other striking it, which in your opinion would you say put it off?

A. Whichever hit it the harder.

1461 Q. Whichever hit the harder?

A. Yes, if either one did, if it were set off, if you excluded all other causes.

1462 Q. That would be the one with the swinging of the arm on the end of the wire, is not true in your opinion?

A. You can probably hit it sharper that way than just a tap.

Redirect examination.

Questions by Mr. C. A. Magaw:

1463 Q. Will these electric blasting caps explode from ordinary handling such as a man would give it while looking at it?

A. No.

1464 Q. Will these electric blasting caps explode from the ordinary handling, such as they would receive when a person was looking at them to examine them?

1465. Mr. Yeiser: Objected to by the plaintiff as being improper re-direct examination.

The objection is overruled.

To which the plaintiff excepts.

A. They would not.

256 By Mr. Yeiser:

1466 Q. You spoke about investigating an accident, you have heard of accidents that sometimes have happened?

A. Yes, I have heard of accidents happening.

Witness excused.

257 1467. Mr. Magaw: The plaintiff now offers in evidence

Exhibit 13, the same being the Workmen's Compensation Law of the state of Iowa, revised to July 4, 1919, arranged by A. B. Funk, Iowa Industrial Commissioner and published by the State of Iowa, at Des Moines.

1468. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial in this case, but no objection is made as to proper foundation for the introduction of same.

The objection is overruled.

To which the plaintiff excepts.

Exhibit 13 was considered read, and same here follows:

Exhibit 13.

1469. It being 5 o'clock p. m. the court adjourned the further hearing of this case to 9 o'clock a. m., Friday, June 2, 1922, at which time all parties being present as before the following proceedings were had, viz:

**Evidence: Plaintiff's Exhibit 13.**

C. A. Magaw.

State of Iowa.

1919.

Ex. 13.

*Workmen's Compensation Law.*

Revised to July 4, 1919.

A. B. Funk, Iowa Industrial Commissioner.

Published by State of Iowa, Des Moines.

State of Iowa.

1919.

Ex. 13.

*Workmen's Compensation Law.*

Revised to July 4, 1919.

A. B. Funk, Iowa Industrial Commissioner.

Published by The State of Iowa, Des Moines.

243 W. S., 210. 157 N. W., 145. 154 N. W., 1037-1060.

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**Service Suggestions.**

This department has to do only with the adjustment of claims of workmen for personal injury arising out of and in course of employment.

Compensation service is comparatively new and its functions are little understood by many. The department as always at the service of any workman or anybody else who may desire information for their friends or for themselves. Letters of inquiry will receive prompt attention, and callers will always find some one cheerfully disposed to talk over any situation submitted.

The basis of department action to promote relief or to establish justice is the accident report by the law required of the employer. Indifference to this obligation is embarrassing to all most concerned, including the department. A penalty of \$50.00 is involved in such neglect. It ought never to be necessary to invoke this penal statute, but it will be done in case of flagrant contempt.

In all cases where obligation is recognized and payment is assumed, statements of settlement must be filed with the department, no matter how indefinite may be the extent of injury or limit of paying period. Employers or insurers must not neglect this important duty.

Settlements made without the approval of this department as provided by law are not binding upon workmen or their dependents. Perhaps the most important function of this service is supervision of dealing between employer or insurer and the employee. Among the former it is believed to be a common purpose to settle legally and fairly, but misconception as to legal requirement has not infrequently resulted in important inaccuracy discovered by department scrutiny and expertness. Employers and insurers have been known to design short settlement and in such cases the law affords protection.

The amended statute authorizes the Industrial Commissioner to award additional medical, surgical and hospital relief in exceptional cases, to the extent of \$100.00. It will be the established policy of the department to exercise this discretion with great care. In the vast majority of cases four weeks of such service usually provided within the limit of \$100.00 is sufficient to the ends of practical relief. In unusual cases this additional allowance will be important to good results and deserved assistance, and only in such exceptional cases should the exercise of this official discretion be requested.

The provision of the law making the approval of the Industrial Commissioner a condition precedent to lump sum settlement has imposed much additional service and occasional embarrassment, but results beneficial to compensation claimants in many cases are apparent. It should be understood as an established policy that commutation will not be approved except in cases where it is made manifest that a departure from the usual rule of weekly payment will be safe and really serviceable to the workman or his dependents and not for specific reasons unjust to employer or insurer.

The Iowa decision in *Slycord vs. Horn*, 162 N. W. 249, definitely excludes from compensation jurisdiction all workmen and employers engaged in threshing, corn shredding, corn shelling, and other employments intimately related to agricultural pursuits.

In compensation jurisdiction generally, pre-existing cause is not successfully plead as a bar to compensation payment in cases of actual and definite injury. It is commonly held that an able bodied workman who has been in regular service, uninterrupted by disease or impairment, is entitled to compensation relief if broken down by an accident or incident arising out of his employment, no matter what showing may be made as to congenital tendency or

latent disease. Disability from pre-existing causes occurring merely in course of employment without well established accident or substantial incident must, of course, be denied recognition.

All concerned should be advised that, except upon lump sum settlement, a workman cannot sign away his rights to the re-opening and readjustment of his claim for compensation if it may be subsequently shown that injustice has been done through misapprehension or otherwise. Employers are urged to cut out of their receipt forms all expressions inconsistent with this statement founded upon the statute. Assuming to bind the workman by pledges void upon their face can serve only to embarrass the service, irritate the workman, and condemn the party submitting the same for endorsement.

When submitted for judgment it is the statutory duty of the Industrial Commissioner to pass upon bills for legal services 258-5 and medical and surgical relief afforded claimants. In view of procedure in this service usually so much less complex and exacting than in the courts and because of the appealing misfortune of the injured workman or his dependents, attorneys are expected to make very moderate charges. Physicians should submit bills no larger than in case the same were to be charged against the workman himself. The idea, where it may obtain, that low fees are simply a benefit to a rich insurer should be abandoned, since he is able in the long run to take care of himself in the advance in rates and the excessive charge is simply a tax on consumption and society in general.

Hernia is compensable, and compensable only, in cases where one who has been continuously performing the service of an ablebodied workman, and, due to some definite accident or incident arising out of employment, he is disabled to the extent of requiring prompt surgical treatment.

To successfully plead intoxication as a bar to compensation payment it must be shown that the workman had not only been drinking or that he was drunk at the time of the accident, but that intoxication was the proximate or definite cause of the injury.

Sub-sections "b" and "c" of Section 2477-m9 have by some insurers been held to mean that a single \$100.00 may be paid in full discharge of all legal obligation for medical, surgical, and hospital service, and for all burial expense. This interpretation of the law is so grossly unjust to dependents of a deceased workman as to definitely suggest a violent assumption of legislative intent. Burial expenses are rarely, indeed, kept within the \$100.00 limit. Medical, surgical and hospital charges may have been—they frequently are, much above this sum. The law is not clear. It should definitely provide that \$100.00 shall be paid as burial charges, and that within the \$100.00 and the four weeks period of medical, surgical and hospital charges should be assumed by employer or insurer. Taking the law as it is, however, and assuming reasonable legislative intent, the department holding is that except where the injury and death are very closely related as to dates, two payments are required within statutory limits as to amount and time of such service.

Employers are reminded that the farming out to insurance companies of their financial risks arising out of injuries suffered by workmen cannot wholly relieve them of responsibility, legal, moral or humane. They are legally bound to report all accidents causing more than one day of disability. They must see that reasonable medical and surgical service is supplied. They will, if entitled to recognition as worthy citizens and humane employers, see that their insurance carrier is kept advised and that workmen and their families in their misfortune are given sympathetic consideration.

Insurance carriers may do much to avoid criticism and promote good administration without the sacrifice of legitimate business advantage. Most workmen depend upon their daily wage for daily bread. When wage payment is suspended they soon feel the pinch of privation. Compensation should be supplied without unnecessary delay. While they may not be expected to be lavish in adjustment beyond the requirements of the law, they are admonished to make settlement without the sort of hairsplitting which inspires suspicion and prejudice, perhaps not unfounded. Insurers will find the department disposed to protect them from imposition. They are expected to understand that while compensation deals sympathetically with the injured, they shall have a square deal when issues of justice are squarely joined. It is gratifying to believe that in recognition of these conditions insurers are more and more disposed to lay their cards face up on the department table and after full understanding as to issues involved to accept department counsel and avoid litigation in cases where the facts are clearly understood. This service is not vested with much arbitrary power, and it is rarely exercised where it exists. The enduring policy is to promote justice in the spirit and purpose of well administered compensation service intended to be relieved of undue formality and circumlocution, in the hope that possible understanding may remove cause for delay and wasteful controversy. It sometimes becomes necessary to invoke arbitration for the purpose of developing facts more or less obscure, and in all such cases this agency may be exercised with benefit and satisfaction, but settlement out of court is most desirable whenever practicable.

A. B. Funk, Iowa Industrial Commissioner.

258-7

### Workmen's Compensation Law.

#### Text of Statute.

Title XII, Chapter 8-A, Supplement to the Code, 1913, as amended by the 37th and 38th General Assemblies. (Amendments by the Thirty-eighth General Assembly printed in *italics*.)

#### Part I.

Section 2477-m. Employers—Employees—Exceptions. (a) Presumption—Employees Excepted.—Except as by this act otherwise

10—1059

provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions and provisions of this act for any and all personal injuries sustained by an employe arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or policemen's pension fund" of any municipal corporation, city or town.

The Act held constitutional in *Hunter vs. Colfax Consolidated Coal Company*—154 N. W. 1037.

An employe while operating as an engineer and laborer a corn shredder for an employer under contract with a farmer to do such work is a "farm laborer" and not covered by the Act.

*Slycord vs. Horn* 162 N. W. 249.

(b) *Compulsory*.—Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

258-8 (c) *Rejection of Terms—Reasons for*.—An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and (who) in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employes in the business;

(2) That the injury was caused by the negligence of the coemploye;

(3) That the employe was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party.

(4) [d] *Negligence Presumed—Burden of Proof—Notices of Election to Reject—Presumption on Failure to Give Notice*.—In

actions by an employe against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

The provisions of the Act establishing the presumption that the injury was the result of the employer's negligence does not abolish the defence of contributory negligence. It merely forces the employer to affirmatively show that he is blameless.

Hunter vs. Colfax Consolidated Coal Co., 154 N. W. 1037.

Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

#### Employers' Notice to Reject.

To the employes of the undersigned and the Iowa industrial commissioner:

You and each of you are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employes of the undersigned for injuries received as provided in the acts of the — (thirty-fifth) general assembly known as chapter — (one hundred forty-seven), and elects to pay damages for personal injuries received by such employe under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter — (one hundred forty-seven) of the acts of the — (thirty-fifth) general assembly and acts amendatory thereto.

(Signed) — — —.



STATE OF IOWA,  
 ——— County, ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the — day of —, 19—, posted at — (State fully place where posted) —.

Subscribed and sworn to before me by — —, this — day of —, 19—.

— —, Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice  
 258-10 of an election to reject the terms of this act, every contract of hire express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment.

An Employer, by his void contract illegally employing a minor under 14 years of age, even though the minor makes misstatement of age in order to secure work, can not limit his liability for any injury to the compensation fixed by the Act, to which the minor was incapable of giving consent.

Sechlick vs. Harris Emery Company, 169 N. W. 325.

Sec. 2477-m1. Wilful Injury—Intoxication.—No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to wilfully injure another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury.

Sec. 2477-m2. Rights of Employe—Notice to Reject. (a) Exclusive of Other rights—Presumption—Notice.—The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa Industrial commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.



A servant having accepted compensation under the Act, can have no standing in court to assert the employer's further liability to him for exemplary damages on the ground of gross and reckless negligence.

Stricklen vs. Pearson Construction Company, 169 N. W. 673.

(b) Rejection—Procedure—Oath—Form—Undue Influence.—In the event such employe elects to reject the terms, conditions and provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out 258-11 of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:

#### Employes' Notice to Reject.

To (Name of employer) ——— and the Iowa Industrial Commissioner:

You and each of you are hereby notified that the undersigned hereby elects to reject the terms, conditions and provisions of an act for the payment of compensation as provided by (chapter one hundred forty-seven of) the acts of the — (thirty-fifth) general assembly and acts amendatory thereto, and elects to reply upon the common law as modified by section three of (chapter one hundred forty-seven of) the acts of the — (thirty-fifth) general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer above named.

Dated this — day of —, 19—.

(Signed) ———.

STATE OF IOWA,  
— County, ss:

The undersigned being first duly sworn deposes and says that the written notice was on the — day of —, 19—, served on the within

named employer of the undersigned by delivering to —  
 258-12 a true, correct and verbatim copy thereof.  
 ———, (Name of person served)

Subscribed and sworn (or affirmed) to before me by the said  
 ——— this — day of ———, 19—. ———, Notary Public.

In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for employment, or any person a member of the firm, association, corporation, or agent or official of such employer, made a request, suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No person interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affidavit required in case an employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit, shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, (it) shall be returned by mail or otherwise to the person who executed the instrument.

Sec. 2477-m3. Tenure of Election. (a) Until Provisions Complied With.—When the employer or employe has given notice in

compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) Notice—How Filed.—When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

Notice of acceptance with Industrial Commissioner where employer had previously filed notice of rejection, is not substantial compliance, without posting notice of acceptance.

Paucher vs. Enterprise Coal Mining Company, 164 N. W. 1035.

Sec. 2477-m4. Liability of Employer After Election to Reject.—Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof.

Sec. 2477-m5. Subsequent Election to Reject—Security for Compensation.—An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject to the approval of the Iowa industrial commissioner.

Sec. 2477-m6. Liability of Other Than That of Employer.—Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) Proceedings Against Both Parties.—The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

(b) Indemnity—Subrogation.—If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor.

Sec. 2477-m7. Contract to Relieve Not Operative.—No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this act except as herein provided.

Sec. 2477-m8. Notice of Injury—Form—Failure to Give.—Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

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## Form of Notice.

To ————:

You are hereby notified that on or about the — day of ——— 19—, personal injury was sustained by ———— while in your employ at (Give name of place employed and point where located when injury occurred), ———, and that compensation will be claimed therefor.

(Signed) ————.

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one (upon) whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time.

Sec. 2477-m9. Compensation Schedule.—If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same

and the employe receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in accordance with the schedule unless otherwise provided.

(b) *At the time of the injury and thereafter during the disability, but not exceeding four weeks of incapacity, the employer, if so requested by the employe, or any one for him, or if so ordered by the court or Iowa Industrial Commissioner, shall furnish reasonable surgical, medical and hospital services, and supplies therefor, not exceeding one hundred (\$100.00) dollars. Provided, however, that in exceptional cases, an application may be made in writing*  
258-16 *to the Iowa Industrial Commissioner for additional surgical, medical and hospital services, and supplies therefor, in which case a copy of such application shall be mailed to the employer or his insurer. If such application is approved by the commissioner, then the employer shall furnish such additional services and supplies for such period, and in such amount as the Iowa Industrial Commissioner shall order, but in no event to exceed one hundred (\$100.00) dollars.*

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(a) *If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to sixty per cent of his average weekly wages, but not more than fifteen (\$15.00) Dollars nor less than six (\$6.00) Dollars per week for a period of three hundred weeks.*

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependants bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section ten (nine).

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule

found in section twenty-four hundred seventy-seven-m-9  
258-17 (j) (2477-m-9-j), Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) of the weekly compensation; if the period of of incapacity extends beyond the forty-second (42) day following the date of the injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation thereafter shall be only the weekly compensation provided for in this law.

(h) For injury producing temporary disability, *sixty* per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality, *sixty* per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars per week, and a minimum of six dollars per week, provided that if at the time of injury, the entploye receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality, the compensation shall be as follows:

For all cases included in the following schedule, compensation shall be paid as follows, to wit:

- (1) for the loss of a thumb *sixty* per cent of daily wages during forty weeks.
- 258-18 (2) For the loss of a first finger, commonly called the index finger, *sixty* per cent of daily wages during thirty weeks.
- (3) For the loss of a second finger, *sixty* per cent of daily wages during twenty-five weeks.
- (4) For the loss of a third finger, *sixty* per cent of daily wages during twenty weeks.
- (5) For the loss of a fourth finger, commonly called the little finger, *sixty* per cent of daily wages for fifteen weeks.



(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts above specified.

(7) The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, *sixty* per cent of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe *sixty* per cent of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one-half of such toe and the compensation shall be one-half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, *sixty* per cent of daily wages during one hundred fifty weeks.

(13) *The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall constitute the loss of an arm, and the compensation therefor shall be sixty (60 per cent) of the average weekly wages during two hundred twenty-five (225) weeks.*

(14) For the loss of a foot, *sixty* per cent of daily wages during one hundred twenty-five weeks.

(15) *The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall constitute the loss of a leg, and the compensation therefor shall be sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.*

(16) For the loss of an eye, *sixty* per cent of daily wages during one hundred weeks.

258-19 (a) *For the loss of a second or last eye, the other eye having been lost prior to the injury resulting in the loss of the second eye, sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.*

(17) For the loss of hearing in one ear, *sixty (60) per cent* of daily wages during fifty (50) weeks, and for the loss of hearing in both ears, *fifty (50) per cent* of the daily wages during one hundred fifty (150) weeks.

(18) The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof, caused by a single accident, shall constitute total and permanent disability, to be compensated according to the provisions of section twenty-four hundred seventy-seven-m-9 (1) (2477-m-9-i), supplement to the code, 1913.

(19) In all other cases in this, clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the schedule, should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(20) The amounts specified in this, clause (j) and subdivisions thereof, shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten (nine) hereof.

Sec. 2477-m10. Death—Payment of Unpaid Balance.—Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Sec. 2477-m11. Examination of Injured Employee—Suspension of Compensation.—After an injury, the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe request, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employe to submit to such  
258-20 examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension.

Sec. 2477-m12. Contributions from Employees—No Reduction of Employer's Responsibility.—The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employes.

Sec. 2477-m13. Trustees for Minors and Those Mentally Incapacitated—Reports. When an injured minor, employe or a minor dependent or one physically incapacitated from earning is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts and the money coming into the hands of the said trustees shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. In case a deceased employe for whose injury or death compensation is payable leaves surviving him an alien de-



pendent or dependents residing outside the United States, the consul-general, consul, vice-consul or consular agent of the nation of which the said dependent or dependents are citizens shall be regarded as the exclusive representative of such dependent or dependents. Such consular officer, or his duly appointed representative residing in the State of Iowa, shall have the exclusive right in behalf of such non-resident dependent or dependents to present, prosecute, litigate, adjust and settle all claims for compensation provided by this act, and to receive for distribution to such dependent or de-

258-21 pendants all compensation arising thereunder.

Such consular officer or his duly appointed representative shall file with the industrial commissioner a copy of his exequatur or evidence of his authority and the industrial commissioner shall notify such consular officer or his said representative of the death of all employees leaving alien dependent or dependents residing in the country of said consular officer so far as the same shall come to his knowledge, provided, however, that nothing herein shall abridge the right of any relative of such decedent who may reside in the State of Iowa to take out administration upon the estate of such decedent, and as such receive the funds due said estate; and provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where decedent last resided, and give bond as administrator for the protection of such funds as provided by law.

Sec. 2477-m14. Commutation of Future Payments—Discretion of Court.—In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which the accident occurred for an order commuting future payments to a lump sum; provided, however, that no judge of the district court shall consider any such application until there is endorsed thereon by the Iowa Industrial Commissioner his approval of such commutation, and no order shall be issued by such judge contrary to the endorsement of said Industrial Commissioner. And such judge may make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duty executed release, upon filing

258-22 which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

Sec. 2477-m15. Schedule of computation.—The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employees who earn either no wages or less than three hundred times the usual daily wage or earning of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) *As to employees employed in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such business or enterprise to operate each year shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.*

258-23 (g) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of the employment.

"Earnings" received by an injured employee do not include money paid by a minor for powder and blacksmith work, which must be deducted from the actual total amount received for the year.

Richards vs. Central Iowa Fuel Company, 166 N. W. 1059.

(h) In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the

compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

Sec. 2477-m16. Terms Defined.—In this act unless the context otherwise requires,

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties, municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal representatives of a deceased employer. Whenever necessary to give effect to section seven of this act, it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employee," and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual or not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business, or one holding an official position or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employee thereof.

Workmen's Compensation must be presumed to have used the word "contractor" in the sense it is commonly employed, and in which it has been defined by the courts. *Pace vs. Appanoose County*—168 N. W. 916.

Whether one is an employee or an independent contractor depends on whether he represents the master as to the result of the work or only as to the means, and, if representing the master only as to result, and selecting the means, he is an independent contractor. *Pace vs. Appanoose County*—168 N. W. 916.

The manner of payment, though often significant, is not necessarily controlling as to whether one is an employee or an independent contractor.

*Pace vs. Appanoose County*—168 N. W. 916.

If a contract gives the employer no control over the details of the work, but leaves that to the party undertaking the work, such party is an independent contractor.

*Pace vs. Appanoose County*—168 N. W. 916.

The test of a contractor is that he render services in course of independent occupation following employer's desires in results but not in means; but the employer's authoritative control is to be dis-

tinguished from mere suggestions as to detail, or necessary co-operation where work is part of larger undertaking.

Pace vs. Appanoose County—168 N. W. 916.

One employed to remove 62 trees preparatory to grading a street, to be paid in a lump sum, he furnishing his own tools, controlling his own time, and being responsible for nothing except the accomplishment of the removal of trees, was a contractor within the meaning of the Act.

Storm vs. Thompson—170 N. W. 403.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents as herein defined legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employe:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury, and should the deceased employe leave no dependent children, and should the surviving spouse re-marry, then all compensation payable to her shall terminate  
258-25 on the date of such re-marriage.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employe at the time when the injury occurred, subject to provisions of subdivision (f), section ten (nine) hereof.

(4) If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at the time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependant, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. Provided, however, that when a lump sum is paid as con-

templated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or stepchild or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Employment is not responsible for lightning injuries unless it increases the hazard from lightning.

Injury by lightning after working hours and while employe was sitting in boarding tent at site of work, furnished by employer, did not arise out of employment.

Griffith vs. Cole—165 N. W. 577.

If an employe has reached his employer's premises on his way to work or is still on the premises on his way home from work when an accident occurs, it is an accident arising out of the employment.

Pace vs. Apanoose County 168 N. W. 916.

Act held to have extra territorial effect.

Pierce vs. Bekins Van and Storage Co. 172 N. W. 191.

(f) The words "injury" and "personal injury" shall not include injury caused by the willful act of a third person directed against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) The word "court" whenever used in this act, unless the context shows otherwise, shall be taken to mean the district court.

Sec. 2477-m17. Insurance Against Compensation Prohibited—Penalty.—(a) Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense, in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies.

Sec. 2477-m18. Contract Respecting Claim for Injury Deemed Fraudulent.—Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent.

Sec. 2477-m20. Attorney's lien—Subject to Approval.—  
258-27 No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa Industrial Commissioner, which approval may be made in term time or vacation.

Sec. 2477-m21. Applicable to Intra-state and Interstate Commerce.—The provisions of this act shall apply to employers and employes as defined in this act engaged in intra-state commerce and also those engaged in inter-state or foreign commerce for whom a rule or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from inter-state or foreign commerce; provided, that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa industrial commissioner, and so far as not forbidden by any act of congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes.

The mere allegation of the employer that the servant was engaged in Interstate Commerce, and hence recovery could be had only under the Federal Act, does not deprive the Industrial Commissioner or the Board of Arbitration of jurisdiction since that is a mere question of fact for their decision.

Des Moines Union vs. Funk—164 N. W. 648.

## Part II.

Sec. 2477-m22. Iowa Industrial Commissioner—Appointment—Term.—There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof.

The Iowa industrial commissioner shall appoint a deputy, for whose acts he shall be held responsible, who shall hold office during the pleasure of said industrial commissioner. Such appointment shall be made in writing, and must be approved by the executive council of the state of Iowa. The deputy, in the absence or



disability of the Iowa industrial commissioner, shall have all the powers and perform all of the duties of the industrial commissioner pertaining to his office, and shall receive an annual salary 258-28 of twenty-four hundred dollars, payable in equal monthly installments, out of the state treasury and in the same manner as are the salaries of other state officials.

Sec. 2477-m23. Salary—Expenses—Office—Seal—Assistants—Accounts—Political Activity—Annual Appropriation.—The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessities in the transaction of the business. The annual salary of the commissioner shall be thirty-three hundred dollars. The commissioner, by and with the consent of the executive council, may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salary of the secretary shall not exceed eighteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries (and) expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to espouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a 258-29 candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution of the United States and of the state of Iowa, and will faithfully and

impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.

There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of the law.

Sec. 2477-m24. Powers—Rules—Witnesses—Reports.—The commissioner may make rules and regulations not inconsistent with this act for carrying out the provisions of the act. The employer shall furnish upon request of an injured employee or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating to such earnings, wages, or salary during the year or part of the year that such employee was in the employment of such employer for the year preceding the injury. Provided, however, that not more than one report shall be required for each on account of any one injury. Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquire in the manner best suited to ascertain the substantial rights of the parties. The commissioner shall have the power to subpoena witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The  
258-30 fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records. The deposition of any witness may be taken and used as evidence in any hearing pending before a board of arbitration in workmen's compensation proceeding in connection herewith. That such deposition shall be taken in the same manner as provided for the taking of depositions in the district court, and when so taken shall be admissible in evidence in such hearings in the same manner subject to the same rules governing the admission of evidence in the district court. Application for permission to take depositions in such case shall be filed in the district court of the county wherein the case for arbitration shall be heard. The commissioner shall make biennial reports to the governor who shall transmit the same



to the general assembly, in which, among other things, the commissioner shall recommend such changes in the law covered by this act as he may deem necessary.

Sec. 2477-m25. Compensation Agreements—Approval.—If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within twenty days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their address as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. In case the injured employe is a minor, either he or the trustee provided for in section twenty-four hundred seventy-seven-m-13 (2477-m-13), supplement to the code, 1913, may execute the memorandum of agreement provided for herein, and may give a valid and binding release for the compensation paid on his account under the terms of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act.

Employer's ignorance of the law is not such mistake as will authorize the setting aside of a partly performed settlement made under the Compensation Act between employer and employes.

Bach vs. Inter Urban Ry. C.—171 N. W. 134.

258-31 Sec. 2477-m26. Committee of Arbitration.—If the employer and the injured employe or representatives or dependents fail to reach an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representatives is unable to act.

The applicant for Workmen's Compensation has the burden of proving by a preponderance of the evidence that the injuries arose out of employment.

Griffith vs. Cole—165 N. W. 577.

Plaintiff seeking compensation under workmen's Compensation Act has burden of showing that injuries arose out of and in the course of the employment within the Act.

Rish vs. Iowa Portland Cement Company—170 N. W. 532.

Sec. 2477-m27. Oath of Arbitrators.—The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I, ———, do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party.

(Signed) ———.

Sec. 2477-m28. Appointment of Arbitrators.—It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect.

Sec. 2477-m29. Powers of Committee—Hearings—Decision.—*The committee of arbitration shall make such inquiries and investigations as it shall deem ne-essary. The hearings of the committee shall be in the city, town or place where the injury occurred, if within the state. If the injury occurred outside this state the hearings of the committee shall be held in the county seat of this state which is nearest to the place where the injury occurred unless the interest parties and the Iowa Industrial Commissioner mutually agree by written stipulation that the same may be held at* 258-32 *some other place. The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for review is filed by either party within five days from the date of filing the decision with said Commissioner, such decision shall be enforceable under the provisions of this chapter.*

Sec. 2477-m30. Examination by Physician—Fee—Evidence.—The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe.

Sec. 2477-m31. Compensation of Arbitrators—Costs.—The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal to one half of the sum from any compensation found due the employe. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts.

Sec. 2477-m32. Review—Second Hearing.—If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of

fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing upon any question of fact.

Sec. 2477-m33. Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

Complaint may not be made on appeal for the first time of any error in computation of the accumulated unpaid award under the Act, which the court orders paid.

Fischer vs. Priebe & Company, 160 N. W. 48.

No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. If any such party is aggrieved by reason of an order or decree of the Iowa industrial commissioner, such party may appeal therefrom to the district court of Iowa, only in the manner and upon the grounds following:

The five day period for applying for a Review of an Arbitration Committee's decision by the Commissioner starts to run on the date that the Committee's award is filed with the Commissioner.

Herbig vs. Walton Auto Company, 171 N. W. 154.

Within thirty (30) days from the date of such order or decree of the industrial commissioner, the party aggrieved may file an application in writing with the Iowa industrial commissioner asking for an appeal from such order or decree, stating generally the grounds upon which such appeal is sought. In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days from the filing of same, cause certified copies of all documents and papers then on file in his office in the matter, and a transcript of all testimony taken therein, to be transmitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred. The application for such appeal may thereupon be brought on for hear-

258-34 ing before said district court upon such record by either party on ten (10) days' written notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling of another judge. The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

(1) That the industrial commissioner acted without or in excess of his powers; or

(2) That the order or decree was procured by fraud; or

(3) That the facts found by the industrial commissioner do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

The Courts may not interfere with the findings of fact made by the Industrial Commissioner when they are supported by evidence, even though it may be thought that there is error.

Pace vs. Appanoose County 168 N. W. 916.

The District Court may confirm or set aside the order of the Industrial Commissioner if he finds the Commissioner has committed error in one or more of the particulars designated by Act.

Herbig vs. Walton Auto Company, 171 N. W. 154.

The Supreme Court is limited in its review upon appeal to questions decided by the lower court.

Herbig vs. Walton Auto Company 171 N. W. 154.

No order or decree of the industrial commissioner shall be set aside by the court upon other than the grounds just stated.

Upon the setting aside of any such order or decree, the court may recommit the controversy to the industrial commissioner for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. An abstract of the Judgment entered by the trial court upon the appeal from any order or decree shall be made by the clerk thereof upon the docket entry of any judgment which may hereinbefore have been rendered upon it. Such order or decree and transcript of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties within the state.

258-35 Any party in interest who is aggrieved by a judgment entered by the district court upon the appeal of an order or decree, may appeal therefrom within the time and in the manner provided for in appeal from the orders, judgments and decrees of the district court of Iowa; but all such appeals shall be placed on the

calendar of the Supreme Court and brought to a hearing in the same manner as criminal causes on such calendar.

No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceedings on appeal from an order or decree, costs as between the parties shall be allowed or not, in the discretion of the court.

Sec. 2477-m34. Review of Payment—Notice.—(a) Any payment required to be made under this act, which has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employe, and if on such review the commissioner finds the condition of the employe warrants such action, he may end, diminish or increase the compensation, subject to the maximum or minimum amounts provided for in this act. All hearings upon review of the Iowa industrial commissioner under the provisions of this section, or under section twenty-four hundred seventy-seven-m-32 (2477-m-32), supplement to the code, 1913, shall be held at Des Moines, Iowa, unless the interested parties and the Iowa industrial commissioner mutually agree by written stipulation that the same may be held at some other place.

Where an award under Act, limited to a period not exceeding 300 weeks, is made subject to reduction, if employe's condition improves so that he can earn part wages, the burden as to change or continuance of condition, in proceedings to enforce payment, is on the employer.

Fischer vs. Priebe & Company, 160 N. W. 48.

Upon the presentation to the court of a certified copy of a decision of the industrial commissioner ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify any judgment or decree then on record in his court to conform to such decision.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties.

258-36 Sec. 2477-m35. Fees Subject to Approval.—Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act.

Sec. 2477-m36. Reports by Employers—Records—Inspection.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this sect on shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage expenditure of such employer, shall always be open for inspection by the industrial commissioner, or any of his representatives presenting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives present-  
258-37 ing written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury.

Sec. 2477-m37. Political Activity and Contributions Prohibited—Penalty.—It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars.

Sec. 2477-m38. Candidates for Commissioner—Political Promises Prohibited—Penalty.—It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars.

Sec. 2477-m39. Recommendations of Candidates to be in Writing—Record—Public Inspection—Financial Interest Prohibited—



Penalty.—All recommendations made by any person to the commission asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to whom the recommendation is made, to make a brief memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially

interested in any business enterprise coming under or  
258-38 affected by this act during his term of office, and if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy.

Sec. 2477-m40. Removal from Office—Filings of Charges—Executive Council Shall Bear.—The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor.

### Part III.

Sec. 2477-m41. Insurance of Liability.—Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensation provisions of chapter eight (8)-a, title XII, supplement to the code, 1913.

Any employer who fails to insure his liability as required herein shall post and keep posted a sign of sufficient size and so placed as to be easily seen by his employes in the immediate vicinity where working, which sign shall read as follows:

## Notice to Employees.

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employees in damages for personal injuries sustained by his employees in the same manner and to the same extent as though he had legally exercised his right to reject the compensation provisions of chapter 258-39 eight-a (8-a), title XII, supplement to the code, 1913.

(Signed) — — —.

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep posted the above notice in the manner and form herein required shall be guilty of a misdemeanor.

Sec. 2477-m42. Mutual Companies—Conditions.—For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with the preceding section.

Sec. 2477-m43. Benefit Insurance—Approval.—Subject to the approval of the Iowa industrial commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period or compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; provided, further, that the approval of the Iowa industrial commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions.

Sec. 2477-m44. Certificate of Approval.—Whenever such scheme or plan is approved by the Iowa industrial commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department.

Sec. 2477-m45. Termination—Appeal to District Court.—Such scheme or plan may be terminated by the Iowa industrial commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the pur-



pose of this act, but from any such order of said Iowa industrial commissioner the parties affected, whether employer or workman, may, upon the giving of proper bond to protect the interests involved, appeal for equitable relief to the district court of this state.

Sec. 2477-m46. Maximum Commission or Compensation for Reinsurance.—No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as commission or compensation for placing or renewing any insurance under this act more than fifteen per cent of the premium charged.

Sec. 2477-m47. Policy Requirements.—Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured.

Sec. 2477-m48. Insolvency Clause Prohibited—Lien of Insured.—No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent of discharging any obligation of the insured to said workman or his dependents.

Sec. 2477-m49. Proof of Solvency—Revocation of Approval.—Where an employer coming under this act furnishes proofs to the insurance department satisfactory to the insurance department and Iowa industrial commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by 258-41 this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa industrial commissioner as will secure the payment of such compensation, such employer shall be relieved of the provision of section forty-two of this act; provided that such employer shall from time to time, as may be required by such insurance department and Iowa industrial commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa industrial commissioner may, at any time, upon reasonable notice to such employer and upon

hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section.

Sec. 2477-m50. When Effective.—Part one of this act shall take effect from and after July first, nineteen hundred fourteen, and parts two and three July fourth, nineteen hundred thirteen, and any employer or employe who serves the notice to reject the terms of the act as by the act provided not less than thirty days before part one thereof takes effect, such notice for the purpose of rejecting the terms of the act shall have the same force and effect as though part one had taken effect July fourth, nineteen hundred thirteen.

Sec. 2477-m51. When Applicable.—That the law enacted by the thirty-fifth general assembly known as senate file number three relating to employers' liability for personal injury sustained by employes in line of duty, and fixing compensation therefor, shall not apply to an injury sustained by such employe of such employer which occurs prior to the time when such act takes effect in all of its parts; but the law and procedure in force at the time such injury occurs, if before such act takes effect in all of its parts, shall be the same as though such act had not been enacted, whether such action is brought before or after such act takes effect in all of its parts.

259 H. A. CAMPBELL, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

1470 Q. State your name?

A. H. A. Campbell.

1471 Q. Where do you live?

A. I live in New York city, New York.

1472 Q. How long have you lived there?

A. 32 years.

1473 Q. What is your business?

A. Inspector for the Bureau of Explosives.

1474 Q. How long have you held that position?

A. 14 years.

1475 Q. Have you had experience in handling explosives of various kinds?

A. I have.

1476 Q. State what experience you have had?

1477. Mr. Yeiser: Objected to by the plaintiff as being immaterial.

The objection is overruled.

To which the plaintiff excepts.

A. I have witnessed the manufacture of explosives of all kinds. I have made tests on them. I made shots with them. I have taken them apart. I have taken them down.

1478 Q. What do you mean that you have taken them apart, what sort of instruments or explosives?

A. Explosives that are set up in any kind of a mechanical device. I have taken the device down and extracted the explosives from them, taken them all apart.

260 1479 Q. Have you taken shells and ammunition apart?

A. Yes, sir.

1480 Q. To what extent have you been engaged in that?

A. Well, from 1911 during the years of my service, and almost exclusively for the last four months.

1481 Q. You have been taking shells and ammunition apart?

A. Yes, sir.

1482 Q. Have you had experience in handling the ammunition such as is used in the war?

A. I have.

1483 Q. Do you know what electric blasting caps are?

A. Yes, sir.

1484 Q. Have you ever seen them made?

A. Yes, sir.

1485 Q. Do you know how they are made?

A. I do.

1486 Q. Tell the jury how an electric blasting cap is made?

1487. Mr. Yeiser: Objected to by the plaintiff as being incompetent and immaterial, there is no evidence here of an electric blasting cap. We object to pursuing the field of qualifications when they are not disputed. We do not dispute his qualifications as an expert.

The objection is overruled.

To which the plaintiff excepts.

A. The electric blasting caps are made by placing 200 copper cylinders in a block. This block has holes drilled at regular intervals in it, in which these copper caps are placed. A certain quantity of explosive charge, mercury—fulminate of mercury or mercury fulminate in combination with other material is placed

261 in these caps or tubes, and they plunge a press, having a pressure of 3,000 pounds which is lowered on to this block and sets the mercury fulminate firmly in the cap. After that is done the cap is taken out and *and* a very small charge of loose fulminate or gun cotton is placed on top. The caps are then changed to another department, and in this place the lead wire and the bridge and plug are inserted into the cap. The bridge is embodied into the loose material on top of the pressed charge. After this bridge is placed there is an asphaltum composition placed on top of the plug and then the lead wires are securely fastened into the top or the open end of the cap by liquid sulphur which solidifies almost immediately after it is poured on the heated composition in the top of the cap.

1488 Q. Are you familiar with what is known as the ordinary blasting cap?

A. I am.

1489 Q. Do you know how they are made?

A. They are made by the same process except that there is no

loose fulminate put in after the charge is pressed and placed in the cap, and there is nothing else—there is no other operation.

1490 Q. In the ordinary blasting cap the one end of the shell is left open?

A. Yes, it is.

1491 Q. And the explosive is exposed to that extent?

A. Yes, sir.

1492 Q. Have you handled electric blasting caps?

A. I have.

1493 Q. I will ask you to look at Exhibit 3 and state what that is?

262 A. That is a dummy Number 6 electric blasting cap.

1494 Q. Is that such a cap as you have described?

A. That is as per my first description.

1495 Q. Is that now loaded with a charge?

A. It is not.

1496 Q. Now in the loaded cap; there is no hole in the end where the fulminate goes?

A. No, there is no hole in the loaded cap.

1497 Q. And is it a fact that Exhibit 3 is the same in outward appearance as the commercial electric blasting cap?

A. Yes, sir, aside from the hole in the bottom.

1498 Q. Mr. Campbell, supposing—do you know whether or not those electric blasting caps will explode from concussion?

A. If it is severe enough it will.

1499 Q. What else will explode it?

A. Intense heat.

1500 Q. Do you know what degree of heat is required to explode it?

A. Well, the bureau of mines pamphlet which was introduced here says 190 degrees "C," but our experiments, bureau of explosives experiments bring it lower than that, to 135 "C."

1501 Q. What would that be Fa-renheit?

A. Oh, about 250.

1502 Q. Suppose an electric blasting cap has lain out in an open coal car and has been exposed to the heat and the sun and the rain and the weather generally for an indefinite period, will that change its explosive character?

A. No, it would not.

1503 Q. Suppose a case where a man would attempt to twist the wires loose from the shell or cap, and in so doing twisted it for a while, and being unable to sever the wire in that manner afterwards mashed the wires off about five or six inches above the cap by laying them across a railroad rail and striking them with a hammer, would that affect or disturb the explosive charge in the shell?

A. It would not.

1504 Q. Why?

A. Because it is imbedded in the ring here. This ring has the purpose of imbedding that sulphur plug so that the charge cannot

be disturbed. You could not discharge it by twisting the wires and it would have no effect upon the cap.

1505 Q. In the manufacture of the shells are they manufactured in such a way that they can be handled by the wires without disturbing the explosive charge?

1506. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question and not proper examination.

The objection is overruled.  
To which the plaintiff excepts.

A. Yes, sir.

1507 Q. For what are these electric blasting caps used?

A. To detonate high explosives.

1508 Q. Are they used in stone quarries and mines?

A. They are.

1509 Q. Any place where there is blasting to be done with high explosives?

A. Yes, sir.

1510 Q. Are they used commercially?

A. Yes, sir.

1511 Q. Are they shipped on railroad trains?

264 A. They are.

1512 Q. Do you know how they are packed when they are shipped out?

A. I do.

1513 Q. Tell the jury how they are packed?

A. They are packed according to the federal regulations. The federal regulations require that the electric blasting cap be packed not more than 50 in a cardboard or pasteboard carton. This carton itself must be put into an outside wooden box. The wooden box must be made in compliance with specification 16 of the federal regulations that specifies the thickness of the lumber, the kind of lumber and the number of nails that must be used and the weight of the nails, and also in regard to the marking of the box.

1514 Q. In the practical use of the cap is the wire protected in any way?

A. It is not.

1515 Q. Tell the jury how the electric blasting cap is handled in its ordinary use?

Q. By a miner, and by the laboring man?

1516 Q. By the miner or the quarryman whoever is using is?

A. These caps are wound on a rack, so that they are wound about that length (indicating) and when an ordinary blaster—a man familiar with the work opens a carton of blasting caps they would be in pretty nearly that shape. The wires should be straight and even. He merely unties the first like that, and whips it out (witness illustrating) He stands up. I do not stand up.

1517 Q. Have you seen them do that?

A. I have.

1518 Q. Have you seen them strike against stones and  
265 other hard substances in doing this?

A. I have seen them hit stones and wood and ground.

1519 Q. Have you made any experiments with them in whipping them out in that way an- striking them against a stone?

A. Yes, sir. I have whipped them out and hit stones and ground with them.

1520 Q. Have you ever known one to explode from such a treatment as that?

A. I have not.

1521 Q. Would it require a blow sufficient to make an indent in the shell to explode the charge?

A. It would be necessary to compress the fulminate.

1522 Q. Does the shell afford a protection to the explosive charge until it is dented?

A. It does.

1523 Q. Mr. Campbell, supposing that a man were sitting on a railroad rail and he had an electric blasting cap with four or five inches of wire attached to it, and the wire was crumpled up, and he wished to straighten it out, and he took the cap in his left hand, and was pulling on the wire with his right hand, and the cap should slip out of his left hand and fly around and hit on the railroad rail, would that in your opinion cause it to explode?

1524. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question, and not containing proper elements *and not containing proper elements.*

The objection is overruled.

To which the plaintiff excepts.

A. I believe it would not.

266 1525 Q. Suppose that the cap—such a cap as I referred to in the previous question had been exposed to the weather in a coal car for some time, would that in your opinion cause it to explode by such a blow, as I have described?

1526. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question and not containing the proper elements.

The objection is overruled.

To which the plaintiff excepts.

A. It would not have any effect upon it. It would not make it any more sensitive.

1527 Q. Suppose the wires had been twisted in an effort to disconnect it from the cap prior to the time that it did receive such a blow as I have mentioned, would that change your opinion?

1528. Mr. Yeiser: Objected to by the plaintiff as being incompetent, irrelevant and immaterial and not a proper hypothetical question and not containing all the element- proper to go into the question.

The objection is overruled.

To which the plaintiff excepts.

A. It would not.

Cross-examination.

Questions by Mr. John O. Yeiser:

1529 Q. Mr. Campbell suppose you were sitting there and the jury was out of the box and someone picked up a cylinder described as *as* similar to this, but not a dummy, and they struck it there and it had exploded, would you deny that it exploded?

1530. Mr. Magaw: Objected to by the defendant as being improper cross-examination and further it is argumentative.

267 1531 Q. I will follow it up with another question. I will ask you to describe the situation to us. Could you account for why it exploded?

1532. Mr. Magaw: Objected to by the defendant as being improper cross-examination and argumentative.

The objection is overruled.

The defendants excepts.

A. Could I account for why a cap exploded?

1533 Q. Why did it explode, if it actually did with a tap?

A. Yes, I would say someone framed it up.

1534 Q. But it did. It did?

A. If you say so. I would not say it did.

1535 Q. If you would see it done?

A. It could not happen from the way you say.

1536 Q. It could not happen that way?

A. No.

1537 Q. What is fulminate of mercury?

A. Fulminate of mercury is a composition of mercury with something else.

1538 Q. How is it produced?

A. By mixing nitro and sulphuric acid and mercury.

1539 Q. The two go together and it changes the molecules of both, does it—a good deal like nitric acid in glycerine form dynamite?

A. It does.

1540 Q. What are molecules?

A. Small particles of matter.

1541 Q. Describe it to the jury?

268 A. I can't describe a molecule. You can make a picture of one developed in an apparatus, but you can't describe it.

1542 Q. You can describe a picture, could you not?

A. Yes.



1543 Q. Microscopic I presume, is it?

A. Well, suppose that I say it looks like an enlargement of the back of a flake of snow.

1544 Q. Did you ever see one?

A. No.

1545 Q. Is there a well defined division of a molecule?

A. So they say.

1546 Q. What is it?

A. An electron.

1547 Q. How many electrons in a molecule?

A. I don't know.

1548 Q. Are there any divisions to an atom?

A. There are.

1549 Q. What is the size of an atom?

A. It depends—I can't answer that.

1550 Q. What is an atom?

A. An atom is lots of electrons.

1551 Q. Now, those are largely theories are they not?

A. Well, the chemists deal with them. They say they are an actuality.

1552 Q. They are produced in the way they are put together are they not?

1553 A. They are produced in the way the thing is taken apart.

1554 Q. No. Are they not taken apart and then put up again? Is not there the element of synthetic chemistry in it?

A. No.

269 1555 Q. What school of chemistry did you go to?

A. I do not say I went to any.

1556 Q. What?

A. I did not say I went to any.

1557 Q. Oh, you don't claim to be a chemist then?

A. No, I said I was an inspector.

1558 Q. What is your office, hunting up these bomb plotters?

A. I do not hunt them up. The police department do that; go and ask them.

1559 Q. You go out and dismantle them?

A. Yes, sir.

1560 Q. And do work of that kind?

A. Well, not just that.

1561 Q. You call yourself an inspector?

A. That is what they call me in the office.

1562 Q. Is it detective work?

A. It is not.

1563 Q. What do you inspect?

A. You inspect the process of manufacturing explosives.

1564 Q. Now, this is the most sensitive work, is it not—I mean product that is used commercially—that is fulminate of mercury?

A. The most sensitive commercially?

1565 Q. Yes?

A. No, it is not the most sensitive.

1566 Q. Is it not the most sensitive that is used commercially?

A. Well, it is not used by itself commercially. It is always made up into some substance.

270 1567 Q. Is there anything more sensitive that is shipped than it?

A. Yes.

1568 Q. What?

A. Well, there are compositions of mercury fulminate and chlorate and ground glass that are shipped known as primers.

1569 Q. The element of force, is that the ground glass?

A. It produces friction more readily than if it was not present.

1570 Q. Does that add any force to the power of explosion?

A. It makes it more sensitive.

1571 Q. The glass does?

A. Yes, sir.

1572 Q. What change would there be in the molecules of the glass in this composition?

A. Molecules of glass don't combine with any explosive.

1573 Q. What is there in glass?

A. The friction produced by glass makes it more sensitive.

1574 Q. That is the mere friction part; the hammer that strikes it?

A. The hammer does not strike the glass. It strikes the composition.

1575 Q. The sharp glass scratches the matter to be ignited?

A. Yes, sir.

1576 Q. So that it does not add any thing to the power?

A. No, but it makes the material more sensitive, and the more sensitive a thing is the more dangerous.

1577 Q. It does not ignite material, it puts a quicker scratch in?

A. I would prefer to say it makes the material more sensitive.

1578 Q. The material itself is the most sensitive, is it not?

A. Yes, sir.

1579 Q. This is used as a necessity because there is nothing  
271 better that can take its place that is being shipped?

A. I would not say that. It is used because it is most suitable and most economical for the purpose for which it is intended.

1580 Q. Now then there were some of these caps that were being made by manufacturers that were too sensitive, were they not?

A. Well, they did not actually produce any. They started to manufacture and we decided that they were too sensitive, and they dropped the production of those caps.

1581 Q. Some were produced before you found them out, were they not?

A. They were not produced for commercial purposes.

1582 Q. They were produced anyway?

A. They had some some place.

1583 Q. Who produced them?

A. I do not know his name,

1584 Q. Don't you know?

A. I do not know his name, no. I do not know the fellow's name.

1585 Q. Wasn't it some manufacturing plant?

A. He was not an actual manufacturer. He just attempted to start to manufacture and they closed him up before he could get many manufactured.

1586 Q. Where was he located?

A. Well, I do not know that he had a plant.

1587 Q. Was he interfering with any good established business?

A. Not that I know of.

1588 Q. There was no danger of him becoming a competitor of Du Pont, was there?

A. You must ask the Du Pont people that. I am not in the commercial business.

1589 Q. Where they had salesmen produce them too sensitive you *half* to stop them?

A. We have not had to condemn any blasting caps made commercially. We stop them before they get to the commercial process.

1590 Q. Were you not asked this question at the last trial of this case when you were a witness, and did you give the following answer: (#1806) "Q. Is it not true that the closed end of the detonator contains the detonating compound which is usually fulminate of mercury, a very unsafe, dangerous composition which is used only because there is nothing better to answer the purpose, is not that true? A. No, sir, there are other things that will answer the purpose but they are not as satisfactory." You said that?

A. Yes, sir, and I said the same thing a little while ago for you.

1592 Q. Then there are others?

A. But they are not as satisfactory, yes, sir.

1593 Q. This is the most sensitive compound that is shipped commercially? is that right?

A. For this purpose.

1594 Q. That is shipped commercially?

A. For this purpose.

1595 Q. Will you answer the question yes or no?

A. Well, I will answer anything if you put it right.

1596 Q. This answer that you gave that I read to you, you gave that before?

A. You say so. I did not read it yet.

1597 Q. Don't you know what you said, and whether you did say it or not? Does it have to be read to you to tell what you said before?

A. This is not the only case I have been on in two years, and it is a long time ago.

1598 Q. Evidently you are in close touch with these defendants? How did you happen to come here?

A. I was ordered here by the chief inspector.

1599 Q. This is the second time you have been ordered here?

A. Yes, sir.

1600 Q. From where?

A. This time I was ordered from New York.

1601 Q. Who gave you the order?

A. Colonel B. W. Dunn.

1602 Q. Any arrangement made about your expenses?

A. He did not make any arrangement with them no.

1603 Q. Did you come with these other gentlemen from New Jersey and Chicago?

A. No, I did not come with anybody from Chicago. I met the chief chemist in Philadelphia.

1604 Q. Where did you come from at the last trial?

A. I think I was ordered from a bomb case in Boston.

1605 Q. Another gentleman came with you from South Amboy?

A. Not with me he did not come.

1606 Q. Who paid your expenses, and will pay them here?

A. I suppose the Union Pacific reimburses the Bureau for them.

1607 Q. How much did they pay you before?

A. They did not pay me anything. I am paid a salary. I work 365 days in the year. I do not get anything on the outside.

1608 Q. You did not send back work to them and say, you can take my deposition as you do other witnesses, but you voluntarily came here?

A. I have to take orders from my chief. He does not tell me what I can do, but he tells me what to do.

1609 Q. When did you discuss this matter as to what your testimony would be?

A. I did not discuss what my testimony would be.

1610 Q. Who did you discuss it with?

A. Nobody can tell me what to testify to.

1611 Q. They just asked you to testify without going over it with you?

A. I know what I will testify. You cannot tell me what to say.

1612 Q. And you came here without being interviewed and without permitting the people connected with this lawsuit to know what you would testify to?

A. I guess they told the chief inspector that they wanted me here, and he told me to come here.

1613 Q. Did they talk with you about this case before?

A. The chief inspector?

1614 Q. Anybody?

A. No, he did not talk to me.

1615 Q. With reference to both detonators, either the fuse or the electric blasting cap which you spoke about, what is the difference between them?

A. What question are you asking me now?

1616 Q. The difference between the electric and the ordinary blasting cap.

A. The blasting cap that is set off by electricity is an electric cap, and the one that is set off by a safety fuse is the ordinary.

1617 Q. The force is the same in each one. It is the method of setting them off?

- A. The explosive force would be equal if they were the same weight of cap.
- 275 1618 Q. If they had the same material?
- A. Yes, sir.
- 1619 Q. Is there not more than one kind of fuse?
- A. Yes.
- 1620 Q. What kind?
- A. What kinds do you want to know about?
- 1621 Q. I want to have any kind you know about?
- A. There are about 45 brands I guess of different kinds of safety fuses.
- 1622 Q. I am not asking about the number. I want to know the kinds?
- A. There is the instantaneous fuse, and there is the time fuse, and the combination fuses.
- 1623 Q. What is the instantaneous fuse?
- A. An instantaneous fuse has a core—a quick match.
- 1624 Q. How fast does that instantaneous fuse ignite?
- A. Very rapidly. You could not measure the time exactly because it is not speeded exactly.
- 1625 Q. You heard the witnesses state that there was no such thing as an instantaneous fuse?
- A. It is not used commercially, it is a military fuse.
- 1626 Q. Speaking of military matters. Is this red cord I am holding up here—you have a good inspector's eye—is this cord I am handing you a fuse of any kind or a rope? (Handing the witness a red cord.)
- A. Presumably it is a fuse, but I want to see the inside of it before I tell you anything. (Witness looking at same and experimenting with it.) It looks like the new military instantaneous fuse.
- 1627 Q. That is used commercially, is it not?
- 276 A. It is not.
- 1628 Q. How do they get it distributed?
- A. What?
- 1629 Q. How do they get it distributed around for military duty?
- A. The military quarter master gives them out.
- 1630 Q. Do you know who makes it?
- A. Sure.
- 1631 Q. Who?
- A. Ensign & Bickford at Simsbury, Connecticut.
- 1632 Q. What is the difference between that and the white fuse I hold up (holding up a white fuse)?
- A. That looks like ordinary safety fuse.
- 1633 Q. How is that used?
- A. The ordinary safety fuse is used in an open end blasting cap.
- 1634 Q. You shove it in at one end?
- A. You must get it in secure so that you will transmit the fire, and you must crimp it into the cap so it will not pull away from the cap.
- 1636 Q. Now, the only difference between the electric and the blasting cap—the two fuses is the manner of setting them off?

A. Well, there is a big difference in the safety of the caps.

1637 Q. One takes longer to ignite?

A. No, one is closed and other is open.

1638 Q. That is the only difference between them?

A. Well, that and the other things that you helped me out with.

1639 Q. What?

A. That and the rest of the answer you helped me out with.

1640 Q. Now I want to call your attention to some of this bomb work you speak of. Will you describe an incendiary bomb?

277 A. What kind?

1641 Q. How many different kinds are there?

A. Bombs?

1642 Q. Yes.

A. There are two kinds of incendiary bombs. There are incendiary bombs made that are—I will describe the bomb. Incendiary bombs you drop from aeroplanes consist of long light metal cylinder, flies on one end and the ignition tubes on the lower end. They go off by impact. And after ignition has occurred a small charge of black powder ruptures the bomb, and if it is an incendiary bomb of the lesser dangerous class it is filled with wads of waste saturated with parafine and oil and they have a small ignition charge under them. So when the bomb opens up the ignition charge ignites the waste oil and spreads the waste and burns up a field of grain or hay or anything that they drop it on to destroy the source of supplies of the enemy. The other kind of ignition bomb is a bomb that is made of thermit. Thermit is a compound which when ignited will burn right through steel or any other metal, except gold.

1643 Q. What?

A. Except gold.

1644 Q. You never burned gold?

A. I did not. I never got that reckless yet. This thermit is used to destroy the enemy encampments and store house and ammunition stores and so forth.

1645 Q. You just heard of the new system of burning steel safes and opening them without an explosion?

A. I did not hear that.

1646 Q. You never did?

A. I have worked out the reason for it.

278 1647 Q. Describe a phosphorous bomb?

A. A phosphorous bomb is of the same general outside description as the others, and it has a bursting charge and spreads phosphorous around. It is of the class of the first bomb I described in the matter of the thermit class.

1648 Q. It is largely set off with these caps, these detonators?

A. It is not.

1649 Q. Is not there—

A. You do not have to light phosphorous. That will take care of itself.

1650 Q. The air will do that?

A. Yes, sir.

1651 Q. You must burst the shell. You don't set it off with a detonator?

A. No. You mention bomb. The shell only has to have a low order of explosion because it is a thin wall bomb. It is not like a high explosive drop bomb. If you had a high explosive bomb you would have to have a detonator.

1652 Q. There are many many different kinds of bombs—many different types and styles of bombs?

A. Do you mean military or the kind that these cranks make up and send around?

1653 Q. They make them up out of everything?

A. Cranks do, but the military bombs are not many.

1654 Q. There are not many?

A. No.

1655 Q. And commercially don't you have them?

A. We do not use bombs commercially.

1656 Q. You work at some explosive charge with some definite purpose, that is it, is it not? You have many different kinds  
279 of explosives that you set off with these caps, with these detonators?

A. All high explosives are set off by blasting caps, if that is what you mean.

1657 Q. Dynamite is sensitive, is it not?

A. In some respects.

1658 Q. It is the same thing as nitric acid in glycerine, that is all there is?

A. Not that you could notice.

1659 Q. There is nothing else but nitric acid and glycering?

A. Yes.

1660 Q. What?

A. You try to ship nitric acid and glycerine in the United States and you would be spending a long time away.

1661 Q. That is all there is to dynamite?

A. No. That is nitroglycerine that you described.

1662 Q. You detonate it, and if it is dynamite it is nitric acid and glycerine?

A. No.

1663 Q. What else is put in it to make it explosive?

A. There is about a thousand kinds of dynamite. Lots of it never was glycerine. Dynamite is a trade name for the explosive.

1664 Q. Can you refer me to an authority on that?

A. My God, I don't know where you learned about explosives.

1665 Q. I want to get some book that gives it as you state it.

A. Look at Marshall. You can get it at any public library. That will give you an elementary knowledge of these things.

1666 Q. Calling your attention to the Government Grenade Training Manual, and at page 13 thereof, and under the third heading, "Dynamite" it says: "Dynamite. Combustible is any  
280 solid capable of absorbing and retaining liquid nitro-glycerine (the solid is called the dope). Oxidizer is nitro-glycerine." From that it is nothing but nitro-glycerine absorbed in anything that will hold it, is not that true?

A. You heard my answer, didn't you? I have answered that.



1667 Q. As far as you know there are a thousand varieties of dynamite?

A. Yes.

1668 Q. Tell me any other way to make dynamite as an explosive but nitric acid and glycerine. Tell me any other chemical that goes into it?

A. There is a dynamite made not so far away from here, and it is composed of nitrous starch and Chlorate.

1669 Q. Nitrous starch is a preparation of nitric acid, is it not?

A. In combination. There is no glycerine present.

1670 Q. As far as that is concerned glycerine never was an explosive, was it?

A. No.

1671 Q. But it simply has the effect of breaking up the molecules and changing them?

A. The acid changes the molecules of the glycerine.

1672 Q. Who makes this, this nitrous starch and chlorate, do you know?

A. I do not know where the firm is out this way. The eastern part of that firm is at a place called Gardons Bridge, Allentown, Pennsylvania.

1673 Q. What is the brand of the dynamite?

A. It is called—They have a million names for it. I do not know what the name of it is.

1674 Q. They don't call it dynamite, do they?

281 A. Sure, they call it dynamite. Go there and say, I want a bomb of dynamite and what do you think they will do? Sell you some one else's stuff?

1675 Q. That is an explosive that we call dynamite?

A. Sure; that is what I am telling you.

1676 Q. When did they get the name dynamite to it, and when did they invent it?

A. I don't know.

1677 Q. Let us go back a little. You called attention to something that might be framed up or staged. Do you often finds things that are framed up and staged?

A. Sure, I do.

1678 Q. Is it a common experience in your calling?

A. Yes.

1679 Q. You find a plaintiff or defendant can do things of that kind?

A. I am not saying anything about plaintiff or defendant. You asked me in regard to an explosion, that someone said or did this or that.

1680 Q. I asked you about a shell being exploded before you, and you said it was a frame up?

A. That was an individual case between you and I.

1681 Q. Did you ever hear of things being salted around, and left at different places to make evidence, by someone you could not trust at all, and another person found it? You have found salted evidence?

A. Well, I have seen it but I never believed it.

1682 Q. Salted evidence, not against your side?

A. Not *an*against any particular side.

1683 Q. You know that it sometimes happens, is not that true?

282 A. Why don't you put what you are saying into proper English so I can answer you?

1684 Q. Do you know what salted evidence is?

A. I imagine you mean if you are trying to stick the Government.

1685 Q. What do you mean by framing up or sticking up a case?

A. It is like this, if someone puts something over on someone.

1686 Q. That exists some time? you get that in your head?

A. I know it.

1687 Q. It is not limited to any particular class of people?

A. That is true.

1688 Q. You spoke of having wound these up, and then putting a limited number only in a corrugated paper box, or carton, and then a limited number of those in a wooden box, and then you gave a definite description as to the size and the weight of the nails, and even the markings and the things to be marked on it. Why don't they just ship them any place?

A. I imagine they would not be so strict if it were not for some manufacturers—some manufacturers would not be strict if there was not a law. Lots of manufacturers would go beyond the law, and so we must have rules.

1689 Q. Why do you have the law?

A. Because some of them are unscrupulous.

1690 Q. And the things may go off before they are intended to, and they are dangerous if they do, is not that true?

A. If they go off they are dangerous, yes, sir.

Witness excused.

283 The defendant rests.

1691 JOHN O'HARA, called in his own behalf, in rebuttal, having been sworn, testified as follows:

Direct examination by Mr. John O. Yeissr:

1692 Q. At the time you received the wire and this brass cap, or cylinder on the end, did you hear your uncle make a statement that it looked like a fire cracker?

1693 Mr. Magaw: Objected to by the defendant as being improper rebuttal, having already been gone over in the case in chief.

The objection is sustained.

To which the plaintiff excepts.

Witness excused.

284 EDWARD W. O'HARA, called as a witness in rebuttal, having been heretofore sworn, testified as follows:

Direct examination by Mr. John O. Yeiser:

1694 Q. Mr. O'Hara, did you continue to work there on the gantry after John was hurt?

A. I stayed there until the first of April of the following year.

1695 Q. Do you know whether this cable that was being wound and fixed at the time John was injured continued to be used?

A. We used a cable. I would not say positive it was that one, but we used a cable.

1696 Q. When you went back was this same cable, the end of which is in court there?

A. Yes, sir.

1697 Q. Or was there another one?

A. I did not see any, not that was fixed up ready to use.

1698 Q. You went right on and used it?

A. Yes, we used the cable.

1699 Q. Were you working right along every day after that?

A. We worked right along until I quit the following April.

1700 Q. And you were there every day?

A. Practically every day.

1701 Q. There was no new cable made after this one was cut off?

A. I do not remember making any.

1702 Q. This one was not cut off before the last trial. They had the whole cable in court and cut this part off that is now in court?

A. This is the first time I saw it like this.

1703 Mr. Bockes: It was cut off by agreement of the parties at the last trial.

Mr. Yeiser: That is right.

Cross-examination.

Questions by Mr. Magaw:

1704 Q. This cable was a new cable that you were making there for use at the gantry?

A. We had broke the one we used before.

1705 Q. Well, that was broken before you went to work there, was it not?

A. There was one there when I first started on the job.

1706 Q. When you first went there. How long had that been broken before you went to make this new one?

A. It was quite a while, several months.

1707 Q. So you were making a new cable to be used at the gantry after it was completed?

A. Yes, sir.

By Mr. Yeiser:

1708 Q. In other words you called it new, although it was an old piece of cable that you were putting in to take the place of one that was necessary to be used, and being used at the time it was broken?

1709 Mr. Magaw: Objected to by the defendant as being leading and suggestive and calling for the conclusion of the witness.

The objection is sustained.

To which the plaintiff excepts.

1710 Q. And was it new cable that was being used?

286 1711 Mr. Magaw: Objected to by the defendant as having been gone over.

The objection is sustained.

Mr. Yeiser: The whole thing has been gone over.

Witness excused.

1712 Mr. Yeiser: The plaintiff now withdraws the offer of Exhibit 7, being the Grenade Training Manual.

1713 The plaintiff rests.

287 In District Court of Douglas County.

### **Defendant's Motion to Dismiss and Order Overruling.**

1714 Mr. Boekes: Both parties having now rested the defendant now objects to the submission of this case to the jury, and moves to dismiss this case, for the reason that the evidence offered by the plaintiff shows that at the time of the accident in question herein the plaintiff was a resident of Pottawattamie County, state of Iowa, and that said accident occurred in Pottawattamie County, state of Iowa, by reason of which this court is without jurisdiction under provisions of General Orders 50-A, and No. 18-A and No. 18-B of the Director General of Railroads; and the defendant further objects to the submission of this case to the jury for the reason that the evidence produced is not sufficient to sustain a verdict or judgment in the plaintiff's favor under the issues in this case.

The motion and objection of the defendant is overruled.

To which the defendant excepts.

1715. The case was then argued to the jury by respective counsel, followed by the court's instructions.

(End of Bill of Exceptions.)

[File endorsement omitted.]

288 And on the 1st day of September, 1922, a Notice of Appeal herein was duly issued out of the clerk's office of said Supreme Court of Nebraska, which said notice with proof of service thereof endorsed thereon, was, on September 4, 1922, duly returned to and filed in the office of the said Clerk of said Supreme Court, and said Notice of Appeal and proof of service is in the following words and figures, to wit:

289 In Supreme Court of Nebraska.

**Notice of Appeal.**

[Filed Sept. 4, 1922.]

THE STATE OF NEBRASKA, ss:

To the Sheriff of the County of Douglas:

You are hereby commanded to notify John O'Hara that an appeal has been taken to the Supreme Court of the State of Nebraska by James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, asking the reversal of a judgment against him rendered on the first day of July, A. D. 1922, in a certain cause in the District Court of Douglas County, wherein John O'Hara was Plaintiff, and James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, was defendant. You will make due return of this notice on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 1st day of September, 1922.

H. C. Lindsay, Clerk, By ———, Deputy.  
(Seal.)

[File endorsement omitted.]

Service of the within Notice of Appeal acknowledged this 2 day of Sept., 1922.

John O'Hara, Appellee, By John O. Yeiser,  
John C. Travis, Attorney-.

290 And afterwards, to wit, on the 11th day of September, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Advance, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

[Title omitted.]

**Motion to Advance.**

[Filed Sept. 11, 1922.]

Comes now John O'Hara, appellee, and refers the Court to Case No. 21656 which shows this to be a second appeal of the same cause of action and under the rules of this Court moves the Court to advance the same for hearing and fix the time in which briefs shall be filed by the respective parties.

John O'Hara, by J. O. Yeiser and J. C. Travis, His attorneys.

Acknowledgement is hereby made of copy of above instrument this 8th day of September, A. D. 1922.

C. A. Magaw, Attorneys for Appellant.

[File endorsement omitted.]

And afterwards, to wit, on the 13th day of September, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Notice of Motion and Proof of Service, in the words and figures following, to wit:

291 In the Supreme Court of the State of Nebraska.

[Title omitted.]

**Notice of Motion.**

[Filed Sept. 13, 1922.]

To James C. Davis, Agent, etc., Appellant in the Above-entitled Cause, and His Attorneys of Record:

You are hereby notified that on Monday the 18th day of September, 1922, at nine o'clock A. M. at Supreme Court Room, State House, Lincoln, Nebraska, appellee will cause Clerk of above named Court to submit to said Court for hearing, the motion heretofore filed, a copy of which is hereto attached.

J. O. Yeiser and J. C. Travis, Attorneys for Appellee.

Received copy of above notice and due and legal service thereof hereby accepted, this 12th day of September, 1922.

C. A. Magaw, Attorneys for Appellant.

[Motion omitted: printed side page 290.]

292 [File endorsement omitted.]

And afterwards, to wit, on the 19th day of September, 1922, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to wit:

Supreme Court of Nebraska, September Term, A. D. 1922.

No. 23057.

[Title omitted.]

Appeal from the District Court of Douglas County.

**Order Setting Cause for Hearing.**

This cause coming on to be heard upon motion of appellee to advance, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion to advance be, and hereby is, sustained and cause set for hearing at the session of court commencing December 4, 1922. It is further ordered that appellant serve and file briefs herein by October 19, 1922, and that appellee serve and file briefs by November 19, 1922.

A. M. Morrissey, Chief Justice.

293 And afterwards, to wit, on the 20th day of October, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Supplement Record, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

[Title omitted.]

**Motion to Supplement Record.**

[Filed Oct. 20, 1922.]

Comes now appellee and shows to the court that this is a second appeal of the same cause and that it is essential to the determination of certain questions presented in appellant's brief which cannot be as successfully shown with the present record or without a consideration of the transcript and bill of exceptions and briefs of the former trial, particularly, with respect to the questions of waiver and res judicata.

Therefore, appellee moves the court to direct the Clerk of the District Court of Douglas County, Nebraska, to return the bill of exceptions and upon the return of the same that the transcript, bill of exceptions and printed arguments, together with this Court's decision and opinion in case #21656 be consolidated with this record



for the proper consideration of this court upon appellant's assignment of alleged errors.

John O'Hara, Appellee, By J. O. Yeiser and  
J. C. Travis, His Attorneys.

[File endorsement omitted.]

294 And afterwards, to wit, on the 21st day of October, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Notice of Motion and Proof of Service, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

[Title omitted.]

**Notice of Motion.**

[Filed Oct. 21, 1922.]

To the above-named appellant and his attorneys of record:

You are hereby notified that the appellee will, on the 6th day of November, 1922, at the hour of nine o'clock A. M. or as soon thereafter as counsel may be heard, call up for hearing before the Supreme Court of Nebraska in Supreme Court Room, State House, Lincoln, Nebraska, the motion heretofore filed in said Court by appellee, a copy of which is hereto attached.

J. O. Yeiser and J. C. Travis, Attorneys  
for Appellee.

Receipt of copy of above notice and attached motion acknowledged and due and legal service thereof accepted this 20 day of October, 1922.

C. A. Magaw, Attorneys for Appellant.

[NOTE.—Motion omitted; printed side page 293.]

295 [File endorsement omitted.]

And afterwards, to wit, on the 6th day of November, 1922, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to wit.

Supreme Court of Nebraska, September Term, A. D. 1922.

No. 23057.

[Title omitted.]

Appeal from the District Court of Douglas County.

**Order Overruling Motion to Supplement Record.**

This cause coming on to be heard upon motion of appellant to supplement record herein, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion to supplement record be, and hereby is, overruled.  
A. M. Morrissey, Chief Justice.

296 And afterwards, to wit, on the 8th day of December, 1922, the following among other proceedings were had and done in said Supreme Court, to wit:

Supreme Court of Nebraska, September Term, A. D. 1922, Dec. 8.

**Argument and Submission.**

The following causes were argued by counsel and submitted to the Court:

\* \* \* \* \*

No. 23057. O'Hara v. Davis. Appeal from Douglas County.  
A. M. Morrissey, Chief Justice.

And afterwards, to wit, on the 15th day of February, 1923, there was rendered by said Court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1923.

No. 23057.

[Title omitted.]

Appeal from the District Court of Douglas County.

**Judgment.**

[Feb. 15, 1923.]

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error ap-

parent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that if, within twenty days, plaintiff file in this court a remittitur of all of said judgment of the district court in excess of \$37,500, as of date thereof, said judgment of the district court will be affirmed for \$37,500; otherwise, said judgment of the district court will be reversed and remanded.

Opinion Per Curiam.

Letton, J., dissenting separately.

A. M. Morrissey, Chief Justice.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to wit:

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No. 23057.

O'HARA

v.

DAVIS.

### Opinion.

[Filed February 15, 1923.]

1. There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.
2. An action for damages against the director general of railroads under the federal employers' liability act is both local and transitory under general order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the director general specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer.
3. A verdict for \$46,840.11 for an injury resulting in the loss of the sight of both eyes held, under the facts in this case, to be excessive, and a recovery of \$37,500 is allowed.

299

Heard Before Morrissey, C. J.; Dean, Letton, Day, Rose, and Flansburg, JJ.; Shepherd, District Judge.

*Per Curiam:*

This case is here for the second time. At the first trial evidence was taken and both parties rested. A motion of defendant to direct a verdict in its favor was sustained, and the action dismissed. On appeal to this court the judgment was reserved and the cause remanded for further proceedings. *O'Hara v. Gines*, 108 Neb. 74, 187 N. W. 643. Upon a second trial plaintiff recovered a judgment for \$46,840.11, and from this judgment this appeal is taken.

The evidence upon the second trial is substantially the same as that produced at the first trial, the substance of which is set forth at length in the former opinion. There are a few matters, however, which should be noticed. At the former trial there was no evidence as to changes, if any, in the explosiveness of the detonator that may have taken place by reason of the exposure and the treatment it had been subjected to. At this trial there is direct testimony of certain experts that the exposure of the detonator to the air, the loss of part of its contents, and the length of time it had been manufactured would make no difference in regard to its liability to explode, and they express the opinion that it could not be exploded in the manner testified to by plaintiff. In this connection it may be said that those witnesses testified that fulminate of mercury may be exploded by heat, by a scratch, or by a severe blow. As was in effect

300 said in the former opinion, it is not inconceivable that the pulling and twisting of the wires in the detonator may have scratched or caused friction in the fulminate, and this, rather than the blow upon the rail, caused the explosion. Another difference in the proof is that in this case there is no exploded detonator in evidence with wires about an inch long, said to have been picked up near the place of the explosion. There was evidence tending to prove that even after the accident plaintiff had said that he saw yellow powder escaping from the cylinder, and that he tapped it upon the rail, which he had denied in his testimony. In the main, however, the testimony is the same as at the former trial, except that the testimony of the experts upon explosives may perhaps be stronger at this trial. There is serious doubt in the mind of the court whether the accident occurred in the manner testified to by the plaintiff, or in that narrated by the witness Berg, who testified that he saw the plaintiff hit the detonator with a hammer. Other witnesses testified that at the time of the explosion the plaintiff was 10 or 12 feet away from where the hammer was lying. Upon the disputed questions of fact the jury had the right to decide, and there is sufficient evidence to sustain their finding that the accident occurred in the manner that plaintiff described.

The principal grounds relied upon for reversal are: That the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.

301 Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial

error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the federal employers' liability act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the negligence of the master. The argument in this connection that O'Hara did not give the wire to the plaintiff to promote the defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent.

Six of the propositions of law relied upon in the appellant's brief and the authorities cited to sustain them are identically the same as those presented upon the former appeal, and the discussion in the opinion upon that appeal has settled the law as applicable to the facts in this case. There is nothing in the record as now presented which materially detracts from or modifies the force of the 302 facts as recited therein.

It is strongly urged that the court had no jurisdiction of the person of defendant or the subject-matter of the action. The action is brought under the federal employers' liability act. The petition does not allege the place of residence of plaintiff.

By general order No. 18-A of the director general of railroads issued April 18, 1918, general order No. 18, relating to the venue of suits against the director general, was amended to read as follows: "It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose." This provision was ineffectual by a later amendment.

In *Alabama & V. R. Co. v. Journey*, 257 U. S. 111, 42 Sup. Ct. R. 6, the supreme court of the United States held that it was within the power of the director general to prescribe the venue of such suits. Whether this power existed up to that time had been a disputed question. Some of the inferior federal courts had held that the director general had such power; others held to the contrary. Some of the later cases are: *Moore & Co. v. Atchison, T. & S. F. R. Co.*, 174 N. Y. Supp. 60; *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459; *Cocker v. New York, O. & W. R. Co.*, 253 Fed. Rep. 676; *Haubert v. Baltimore & O. R. Co.*, 259 Fed. 361.

After the petition was filed and summons served in Douglas county, the director general, "appearing specially and for the 303 purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein." As grounds therefor he alleged that plaintiff did not reside in Douglas county, Nebraska, at the time of the accrual of the cause of action,

✓ and that such cause of action did not arise in said county and state. No evidence was presented to prove these allegations, and the motion was properly overruled. The defendant then answered, raising the same objections to the jurisdiction of the court, and also pleading to the merits.

✓ The orders of the director general are concerned with and govern only the venue of the action. If the action had been brought in the county or district in which the plaintiff resided, the fact that the accident took place in another county or district would not divest the court of jurisdiction. The action itself under these orders is therefore so far transitory in its nature as to the subject-matter, and if jurisdiction of the person of the defendant had been obtained either by proper service of summons or voluntary appearance, the question of the liability of the director general would be properly before the court.

Similar provisions as to venue are to be found in the Code of Kentucky. In that state an action against a common carrier for injury to a passenger, or to other person, or his property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff, or his property, is injured, or in which he resides, if he resides in a county 304 through which the carrier passes. The supreme court of Kentucky held in *Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*, 87 Ky. 651, that said action is both a local and a transitory one. It is transitory because it may be instituted in another county than that in which the tort was committed, and under the Kentucky Code a chief officer, or agent, may be served in any county where he may be found; and it is made local at the option of the plaintiff. It is said: "The action, therefore, being both local and transitory, the common pleas court of McCracken county had jurisdiction of the subject-matter, and could have rendered a personal judgment if there had been any service on the defendant as provided by the Code." It is also said: "The appellant in this case has taken every step to prevent a judgment upon it without service, and has made no plea to the jurisdiction of the court as to the subject-matter, or entered any appearance to the merits by answer or otherwise, until compelled to do so by the trial court." It was held that the special appearance should have been sustained.

Gillen v. Illinois C. R. Co., 137 Ky. 375, was an action against a railroad company for damages from a fire started by the negligence of the company, which injured the fences and timber upon the plaintiff's land. The court, after quoting section 73 of the Code providing that an action against a carrier for injury to a person, or his property, must be brought in the county in which the defendant resides, or in which the plaintiff, or his property, is injured, or in which the plaintiff resides, if he resides in a county through 305 which the carrier passes said: "The purpose of sections 62-77 of the Code is not to regulate the jurisdiction of courts. The Code of Practice does not treat of the jurisdiction of courts, or attempt to regulate it. It simply regulates the procedure in civil actions. The purpose of these sections of the Code, as shown in the

title, is to regulate the county in which the action may be brought; or, in other words, the venue of actions. If an action under any of these sections for the recovery of money within the jurisdiction of the court is not brought in the proper county, it may be dismissed if the objection is properly taken."

In a number of decisions of the United States courts statutes providing for the venue of actions brought thereunder have been considered, and it has been held that, even though the statute under consideration in the particular case provided that actions should be brought only in the district where the defendant resides, or where the cause of action accrued, the defendant, if he made an appearance in an action brought in another district than that of his residence for any other purpose than objecting to the jurisdiction of the court over his person, waived his personal privilege not to be sued in such court. If the court in such case had jurisdiction of the subject-matter, it was given jurisdiction of the person by such an appearance and was vested with full authority to proceed. The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived. In *re Moore*, 209 U. S. 490; *Midland Contracting Co. v. Toledo Foundry & Machine Co.*, 154 Fed. 797; *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669; *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 Fed. 200; *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 398; 28 Sup. Ct. 720; *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127; 11 Sup. Ct. 982; *United States v. Hvostlef*, 237 U. S. 1. 35 Sup. Ct. 459.

In most of the cases cited from the United States Supreme Court, the trial court's attention was called, at the time of the special appearance, to a question based upon the merits of the case, in addition to the objections to the jurisdiction over the person of the defendant. In Nebraska, Ohio, and some other states an objection, which is not well taken, to the jurisdiction of the court over the subject-matter of the action, constitutes a general appearance. *Handy v. Insurance Co.*, 37 Ohio St. 366; *Elliott v. Lawhead*, 43 Ohio St. 171.

In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, on rehearing, 71 Neb. 273, defendant filed objections to jurisdiction as follows: "Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," etc. It is said in the syllabus of the case: "The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; but, where the motion also challenges the jurisdiction of the court over the subject-matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons." This case is followed on this point in the following cases: *Summit Lumber Co. v. Cornell-Yale Co.*, 85 Neb. 468; *Clark v. Bankers Accident Ins. Co.*,



96 Neb. 381; Lillie v. Modern Woodmen of America, 89 Neb. 1; Rakow v. Tate, 93 Neb. 198; Legan v. Smith, 98 Neb 7; Maxwell v. Maxwell, 106 Neb. 689; 184 N. W. 227; State v. Westover, 107 Neb. 593, 186 N. W. 998. See, also, Mahr v. Union P. R. Co., 140 Fed. 921.

If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas county, the court would not have acquired jurisdiction over his person; but, if the defendant appears for any purpose except to object to the court's jurisdiction over his person, he thereby enters a general appearance in the action.

Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done. There is no great hardship in the rule because, as said in Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 273:

308 "A nonresident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714; York v. Texas, 137 U. S. 15. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled."

It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction.

Did the district court have jurisdiction of the subject-matter of the action? Until the orders of the director general, the district courts of this state had full jurisdiction to try actions against railroads brought under the federal employers' liability act wherever service upon the defendant could be obtained. The order of the director general fixing the venue did not affect the subject-matter of the action. If, and when, jurisdiction of the person had been obtained, the district court had full power to adjudicate the question whether the defendant had been guilty of actionable negligence.

This was the essential matter presented to the court for its determination, and which, if it had acquired jurisdiction of the person, it had the power to decide. A verdict that the defendant was not guilty of negligence and a judgment dismissing the case would be res judicata in every court in the land, always

premising that jurisdiction of the person had been obtained. *Hunt v. Hunt*, 72 N. Y. 217.

But, aside from these considerations, these facts are relevant. At the first trial motions were made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, but no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case.

Lastly, it is complained that the verdict is excessive. Plaintiff was earning \$3.44 a day at the time of the accident. He had an expectancy of life, according to the Carlisle table, of 42.87 years. He suffered severe pain and his sight has been totally destroyed. The loss of earning power is only a part of the injury which the plaintiff sustained. He is compelled to walk in darkness for the remainder of his life, to be deprived of all the pleasures and joys which come from vision. His knowledge of the outer world will be largely circumscribed by the loss of the sense of sight, and he must in great measure continually be dependent upon others. No verdict for as large an amount as in this case has ever been sustained for such an injury, so far as the court has been able to ascertain, and no case allowing such a recovery has been cited to us. Considering the present worth of the amount of the verdict, and the amount which it would require to purchase an annuity providing the same daily wages which the plaintiff was earning at the time of the accident, for his expectancy of life, we are of the opinion that any verdict in excess of \$37,500 is excessive. The judgment of the district court is affirmed if plaintiff file a remittitur of all in excess of \$37,500 as of the date of the judgment, within 20 days, otherwise the judgment of the district court is reversed.

Affirmed on condition.

311

In Supreme Court of Nebraska.

### Dissenting Opinion.

LETTON, J., Dissenting:

If, as I am satisfied, the question of jurisdiction was not passed upon, or defendant concluded on this point by the former decision, the majority opinion is in direct conflict with the following decisions, and overrules them without mentioning them: *Hurlburt v. Palmer*, 39 Neb. 158; *Kyd v. Exchange Bank*, 56 Neb. 557; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801; *Templin v. Kimsey*, 74 Neb. 614; *Stelling v. Peddicord*, 78 Neb. 779.

In these cases it is held that a defendant may plead that he is privileged from suit in the county where the action is brought, without thereby making a general appearance in the action. The cases cited in the opinion as to a general appearance being made, when jurisdiction over the subject-matter of the suit is challenged, are

not applicable. Believing that defendant was privileged from suit in Douglas county, and had not waived this privilege, I respectfully dissent.

312 And afterwards, to wit, on the 21st day of February, 1923, there was filed in the office of the Clerk of said Supreme Court a certain Remittitur, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

[Title omitted.]

**Remittitur.**

[Filed Feb. 21, 1923.]

Comes now John O'Hara, plaintiff and appellee in above entitled action, and hereby remits all of the judgment herein in excess of \$37,500.00 as of the date of the judgment.

Dated this 21st day of February, 1923.

John O'Hara, By Jno. O. Yeiser and J. C.  
Travis, His Attorneys.

[File endorsement omitted.]

And on the same day, to wit, 21st day of February, 1923, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1923.

No. 23057.

[Title omitted.]

Appeal from the District Court, Douglas County.

**Judgment on Remittitur.**

313 It appearing to the court that remittitur of all of the judgment of the district court herein, in excess of \$37,500, heretofore ordered by this court to be filed herein, has this day been filed by appellee, it is by the court ordered that the judgment of the district court of Douglas county in the sum of \$37,500, with interest from the date thereof, be, and hereby is, affirmed; that appellant pay all costs incurred herein, taxed at \$—, and have and recover of and from appellee the costs so expended; for all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. Morrissey, Chief Justice.

## Motion for Rehearing.

And afterwards, to wit, on the 6th day of March, 1923, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing, in the words and figures following, to wit:

In the Supreme Court of Nebraska.

[Title omitted.]

**Motion for Rehearing.**

[Filed March 6, 1923.]

Comes now the appellant and moves the court to vacate and set aside the judgment and opinion heretofore rendered herein and to grant a rehearing for the following reasons:

## I.

Because the court did not pass upon the right of the plaintiff to substitute James C. Davis, Agent of the President, under Section 206 of the Transportation Act, 1920, as defendant in place of the previous defendant, Walker D. Hines, Director General of Railroads, although this question was duly presented by the record and contended for by the appellant, both in his brief and on the oral argument.

314

## II.

Because the court erred in holding and deciding that the appellant waived his privilege from suit in the District Court of Douglas County, Nebraska, and in holding and deciding that that court had jurisdiction of this action.

## III.

Because the court erred in holding and deciding that the evidence in this case proved facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, whereas such evidence failed to prove either that the plaintiff was employed by the defendant in interstate commerce when he was injured, or that the defendant was guilty of negligence resulting in the plaintiff's injuries, and because the evidence showed that the plaintiff assumed the risk.

N. H. Loomis, Edson Rich, C. A. Magaw,  
Attorneys for Appellant.

[File endorsement omitted.]

315 And afterwards, to wit on the 30th day of March, 1923, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1923.

No. 23057.

[Title omitted.]

Appeal from the District Court of Douglas County.

**Order Overruling Motion for Rehearing.**

[Filed Mar. 30, 1923.]

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein denied.

A. M. Morrissey, Chief Justice.

316 And afterwards, to wit, on the 2d day of April, 1923, there was filed in the office of the Clerk of said Supreme Court of Nebraska, certain objections of appellee to the allowance to writ of error, which objections are in the words and figures following, to wit:

In the Supreme Court of Nebraska.

[Title omitted.]

**Objections to Allowance of Writ of Error.**

[Filed Apr. 2, 1923.]

Comes now appellee and plaintiff and objects to the allowance of a writ of error to the supreme court of Nebraska upon the ground that there is no appealable question for presentation & any effort to appeal is frivolous—also ask leave to be heard before granting such an order.

John O. Yeiser, John C. Travis, Atty-. for  
Appellee.

[File endorsement omitted.]

317 And afterwards, to wit, on the 10th day of April, 1923, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a Motion of appellant in re the use of original exhibits herein as a part of the transcript in these certiorari proceedings, with notice and proof of service thereof, in the words and figures following, to wit:

In the Supreme Court of Nebraska.

[Title omitted.]

**Motion re Exhibits.**

[Filed Apr. 10, 1923.]

Comes now James C. Davis, Agent of the President under Section 206 of the Transportation Act, 1920, appellant in the above-entitled action, and moves the Court to make an order authorizing and directing the Clerk of this Court to detach the following exhibits from the Bill of Exceptions and make the same a part of the transcript in the certiorari proceedings, to-wit:

Plaintiff's Exhibits 4 and 5, photos, at pages 38 and 39, Bill of Exceptions.

Plaintiff's Exhibit 3, dummy cap and wire, at page 65, Bill of Exceptions.

Defendant's Exhibit 21, two wires and plug, at page 166, Bill of Exceptions.

Defendant's Exhibit 20, exploded electric cap, at page 192, Bill of Exceptions.

Defendant's Exhibit 14, photo, at page 217, Bill of Exceptions.

Defendant's Exhibits 15, 16 and 17, photos, at page 220, Bill of Exceptions.

Defendant's Exhibit 18, photo, at page 222, Bill of Exceptions.

Defendant's Exhibit 13, pamphlet, Iowa 1919 Workmen's Compensation Law, at page 233, Bill of Exceptions.

N. H. Loomis, Edson Rich, C. A. Magaw,  
Attorneys for Appellant.

[File endorsement omitted.]

318

In the Supreme Court of Nebraska.

General No. 23057.

[Title omitted.]

**Notice of Motion.**

To said appellee, John O'Hara, and his attorneys of record, John O. Yeiser and John C. Travis:

You, and each of you, are hereby notified that the appellant herein, James C. Davis, Agent of the President under Section 206 of the Transportation Act, 1920, will present a Motion, of which the attached is a copy, to the Supreme Court in its court-room in the City of Lincoln, on Friday the 13th day of April, 1923, at nine

o'clock A. M., or as soon thereafter as the Court's convenience will permit.

N. H. Loomis, Edson Rich, C. A. Magaw,  
Attorneys for Appellant.

Service of the within and foregoing notice is hereby acknowledged this 10th day of April, 1923, under protest and objection to any further action on part of defendant who has no Federal question to present on certiorari.

John O. Yeiser, John C. Travis, Attys. for Plaintiff.

[NOTE.—Motion omitted; printed side page 317.]

319 [File endorsement omitted.]

And afterwards, to wit, on the 16th day of April, 1923, there was entered of record and spread upon the journal of said Supreme Court of Nebraska, a certain Order directing the Clerk of said Court to certify certain original exhibits in this transcript, in the words and figures following, to wit:

320 Supreme Court of Nebraska, January Term, A. D. 1923.

No. 23057.

[Title omitted.]

Appeal from the District Court of Douglas County.

**Order re Original Exhibits.**

This cause coming on to be heard upon motion of appellant, James C. Davis, agent, for an order authorizing and directing the clerk of this court to attach the following exhibits from the bill of exceptions and make the same a part of the transcript in the certiorari proceedings, to wit:

Plaintiff's Exhibits 4 and 5, photos, at pages 38 and 39, Bill of Exceptions,

Plaintiff's Exhibit 3, dummy cap and wire, at page 65, Bill of Exceptions,

Defendant's Exhibit 21, two wires and plug, at page 166, Bill of Exceptions,

Defendant's Exhibit 20, exploded electric cap, at page 192, Bill of Exceptions,

Defendant's Exhibit 14, photo, at page 217, Bill of Exceptions,

Defendant's Exhibits 15, 16 and 17, photos, at page 220, Bill of Exceptions,

Defendant's Exhibit 18, photo, at page 222, Bill of Exceptions,

Defendant's Exhibit 13, pamphlet, Iowa 1919 Workmen's Compensation Law, at page 233, Bill of Exceptions,



was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, sustained and the clerk of this court is authorized and directed to attach said original exhibits to the transcript in the certiorari proceedings.

A. M. Morrissey, Chief Justice.

321 On the 28th day of March, 1922, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Judgment of Reversal in the words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1922, March 28.

No. 21656.

JOHN O'HARA, a Minor, by His Next Friend, FRANK J. O'HARA,  
Appellant,

v.

WALKER D. HINES, Director General of Railroads, Appellee.

Appeal from the District Court of Douglas County.

**Judgment of Reversal in Former Appeal.**

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and same hereby is, reversed and cause remanded; that appellant pay all costs incurred herein, taxed at \$—, and have and recover of and from appellee the costs so expended; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Morrissey, C. J.

A. M. Morrissey, Chief Justice.

322

In Supreme Court of Nebraska.

No. 21656.

O'HARA

v.

HINES.

**Opinion in Former Appeal.**

[Filed March 28, 1922.]

*Opinion.*

1. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.
2. The provisions of the federal employers' liability act create a liability against the employer for the negligence of a fellow employee of an injured workman.
3. Evidence reviewed in the opinion, and held that it was error for the trial court to instruct the jury to return a verdict in favor of defendant.

323 Heard Before Morrissey, C. J.; Letton, Rose, Dean, Aldrich, Day, and Flansburg, JJ.

MORRISSEY, C. J.:

Plaintiff brought this suit against defendant under the federal employers' liability act. At the conclusion of the testimony, on motion of defendant, the court instructed the jury to return a verdict in favor of defendant. From the judgment entered on the verdict, plaintiff appeals.

The facts alleged in the petition and supported by plaintiff's evidence are as follows: September 13, 1919, plaintiff, a boy 18 years of age, was in the employ of defendant as an unskilled laborer in the operation of a crane, or gantry, in the Union Pacific railroad yards, in Council Bluffs, Iowa. The Union Pacific Railroad Company owned a line of railroad crossing several states and was operated by defendant, the director general of railroads, in both interstate and intrastate commerce. The gantry on which plaintiff was employed was a big type of crane used in the transfer of heavy articles of freight from "bad order cars" to "good order cars" and also for the rearrangement, or reloading, of heavy pieces of freight.

On the day of the injury, plaintiff, his fellow workmen, and foreman had transferred an interstate shipment of steel from a "bad order car" to a "good order car." When this job was completed there was then no other car of material at the gantry ready for immediate transfer, but there was in the yards awaiting such transfer a carload of poles. This was likewise an interstate shipment. In making the transfer of freight by means of the appliance known as a gantry the men sometimes made use of ropes, chains or cables. For some time prior to plaintiff's injury there had been no cable in use, but there was in the tool house, situated where the men were employed, part of a wire cable that had formerly been used on the machine itself.

324 The foreman gave directions to his crew of workmen, which consisted of plaintiff and three fellow workmen, to prepare this old cable for use in the transfer of the car-load of poles. In obedience to this order the men took the cable from the tool house and cut therefrom a section of the required length, 20 or 30 feet; clamps, or "U" bolts, were procured and a loop was made at each end of the cable sling. As thus made up, at each end of this cable there was left a rough end, each separate strand of the cable being exposed. This condition endangered the hands of any workman who might handle the cable. In order to obviate this danger, cloth was procured with which to wrap the exposed wires, and it became necessary to procure a cord or wire to tie the cloth. No suitable wire or cord had been furnished by defendant, but one of the workmen, having some fine flexible wire in the coal car from which these men had unloaded steel during the forenoon, went to this car and procured wire, which is described as two strands, each about four feet in length, held together at one end by a copper cylinder, or it might have been one strand of wire eight feet in length doubled and fastened in the middle by this copper cylinder. This workman testified that after procuring the wire he held it up for the foreman's inspection; that the foreman expressed the opinion that it might be suitable, but gave expression to a doubt of the quantity being sufficient, because each end of the cable would have to be wrapped. The workman testified, further, that he attempted to twist the wire loose from the cylinder, but did not succeed; that he thereupon laid the wire across a steel rail and cut off one strand with a hammer. The strand thus cut off was then used in wrapping the cloth on one end of the cable. He later cut the remaining strand from the copper cylinder. He testified that he was about to throw the cylinder, with so much of the wire as was then attached thereto, into the car where he had found it, when plaintiff either asked for it, or reached for it, or both, and the witness thereupon handed the cylinder with the short pieces of wire projecting therefrom to plaintiff. The evidence is not clear as to the length of the wires still attached to the cylinder. 325 It is said that they were "crumpled up," but according to plaintiff and his witness they were a few inches in length. Plaintiff testified that he did not know where the wire had been procured, and had not before seen the copper cylinder and did not know what it was; he says that he took it from his fellow workman

for the purpose of straightening the wire in order that it might be used in tying the wrapping upon one end of the cable. Within a very short time after plaintiff was handed this wire and cylinder by his fellow workman the cylinder exploded.

According to plaintiff's testimony he was in total ignorance of the dangerous character of the article he had been handed by his fellow workman. The copper cylinder is described as about one and one-half inches in length and one-fourth of an inch in diameter. Plaintiff testified that he held the cylinder in his left hand while with his right hand he pulled upon the crumpled, twisted pieces of wire for the purpose of straightening them. The cylinder slipped from his left hand and with the swing of his right arm it struck the steel rail on which he sat and the impact caused it to explode. The explosion was of such force that it indented the surface of the steel rail, and destroyed the sight of plaintiff's eyes. It may be taken as established, or conceded, that this cylinder with its attachments was an electric detonator generally used in exploding dynamite. The evidence shows that the explosive matter in detonators of this character consist of mercury fulminate; that this is pressed into the lower end of the cylinder, then a similar amount of powdered fulminate is put in. The ignition apparatus is then inserted and the ends of the wires imbedded in the last fulminate; and the cylinder is then filled with melted sulphur. Although these detonators are designed to be exploded electrically, they may be exploded by heat, by a blow or shock of sufficient intensity, or by friction. There is evidence offered by defendant calculated to dispute the testimony of plaintiff as to the cause of the explosion, but the explosion itself is not denied.

326 Plaintiff contends that defendant was negligent in failing to provide the necessary wires, repairs, tools and machinery for the proper equipment and operation of the machine with which plaintiff worked; that the foreman was negligent in failing to inspect properly the wire picked up in the coal car by plaintiff's fellow workman, and that this wire and its explosive attachment was negligently given to plaintiff by his foreman and fellow workman as a part of the tools and materials with which he was to work.

Defendant expressly alleges that plaintiff's fellow workman was not acting within the scope and course of his employment when he handed the explosive cylinder to plaintiff; that it was not given in connection with the prosecution of defendant's business, but at the request of plaintiff to satisfy the curiosity and personal ends of plaintiff, and denies that plaintiff's injuries arose out of or in the course of his employment, or that plaintiff was acting within the scope of his employment at the time he received from his fellow workman the explosive substance, or when it was exploded. Defendant also alleges that neither he nor his agents, or employees, had any knowledge of the presence of the explosive until its discovery in the empty coal car by plaintiff's fellow workman; that neither defendant nor any of his agents, or employees, had any knowledge as to the place from whence the explosive came. It is further alleged that whatever injuries plaintiff received were due

solely to his own negligence, and that when he received from his fellow workman the explosive he assumed the risk of exploding it. It is further alleged that plaintiff has no cause of action against defendant unless it is based upon the Iowa compensation law.

In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of the gantry. Passing over these allegations of negligence for the present, let us mention what appears to have been palpable negligence on the part of the fellow workman (and

his negligence was the negligence of defendant) in handing 327 this explosive to plaintiff. The fellow workman was older in years, and more experienced in service, than plaintiff; he knew that the wire was not originally designed for the work to which it was being put; that it had not been regularly furnished from the tool house or supply store. He saw it in the empty coal car; took it therefrom, discovered the copper cylinder, and testified that in his attempts to twist the wire and break it off from the cylinder he saw a powdered substance spilling out of the cylinder. He said that it looked to him like a firecracker. Assuming that he was a man of ordinary intelligence and experience, it is strange, indeed, that these things did not suggest to his mind the likelihood of danger. That high explosives are used in the mining of coal and that detonators such as this are employed in discharging dynamite and other high explosives is a matter of common knowledge.

Plaintiff did not know at the time he was given this dangerous instrumentality that it had been picked up in an empty coal car; he did not know that his fellow workman had seen the powdered substance with which the cylinder was filled spilling therefrom as a result of the twisting and pulling of the wires. He received no warning of any kind. Indeed, his fellow workman testified that when he passed the cylinder to plaintiff he did so with the statement that it looked like a firecracker, a remark well calculated to put plaintiff off his guard. However, plaintiff does not appear to have heard the remark, and the most that can be said definitely is that it was placed in plaintiff's hands without warning. The foreman expressly denied that the wire was called to his attention, or that he had been asked to inspect it, or that he gave any general order to procure it. Defendant offered the testimony of experts, and each testified that in his opinion the detonator could not be exploded in the manner described by plaintiff. But it may be noted that each of these witnesses gave his testimony on a question presupposing the detonator to be in the same condition as when it left the factory. The

328 changes, if any, that may have taken place by reason of the treatment given the detonator in question do not appear to have been taken into account. From the expert testimony furnished by defendant's witnesses, and from the official government bulletins in evidence, we learn that detonators such as the one described, constructed to be exploded by an application of electricity, are less dangerous to handle than detonators so constructed that they may be discharged by slow burning fuses. The reason assigned is

that the explosive substance, mercury fulminate, in the electrical detonators, is covered by a substance put in the cylinder above it, while in the other type of detonator the mercury fulminate is exposed in the cylinder. The testimony also shows that the mercury fulminate may be exploded not only in the ways designed by the manufacturers, but that if hot ashes are dropped into a cylinder where the explosive is exposed it may cause an explosion, or the mercury fulminate may be exploded by a scratch or by friction. It is not inconceivable that in the twisting and pulling of these wires and breaking away of the filling above the mercury fulminate the wires or apparatus intended to convey the electrical current to the explosive substance may have scratched or penetrated it, and that that, rather than the blow upon the rail, caused it to explode. But the exact cause of the explosion does not seem to be controlling.

Defendant also offered testimony from which it may be argued that plaintiff struck the cylinder with a hammer. He is said to have had a hammer in his hand very shortly before the explosion. What is said to be an exploded detonator is also offered in evidence. This exhibit was picked up near the scene of the accident, shortly thereafter. It consists of a mutilated copper cylinder and a very small wire, or wires, the ends of which project beyond the cylinder less than an inch. Assuming that this is the exploded cylinder which caused the injury, it is argued that it shows that the wires had been cut off close up to the cylinder, and, therefore, plaintiff

329 could not have been pulling upon the wires to straighten them and use them in the defendant's business, but that he had turned aside from the master's business and was attempting to gratify his idle curiosity in an effort to take the cylinder from the wires. Whatever force there may be in this argument it was for the jury to say what conclusion they would reach from an examination of the exhibit, together with all the other evidence before them. The testimony of plaintiff and his fellow workman is clear that at the time the cylinder was handed to plaintiff there were several inches of wire attached; that this wire had been crumpled and twisted close to the cylinder. Who can say that an explosion of the force and violence of that which occurred might not have broken off and blown away these several inches of wire that were knotted and twisted at the end of the cylinder? Surely not the court; this, if material, was for the jury.

"In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672; 178 N. W. 267.

Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the director general of railroads set out as a part of the motion provided that suits against the director general of railroads, as authorized by gen-



eral order No. 50-A should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. ) But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. (See subdivision b, Rule 18 of this court.)

§30 In the briefs on either side counsel have raised many issues not necessary to a determination of the real issues, and in the preparation of this opinion we have not undertaken to follow them. The issues presented are simple. The statute on which plaintiff's cause of action rests gives him a right of recovery if he is able to prove the allegations of his petition, and the proof offered is of such character and weight that it was for the jury, and not for the court, to determine the issues.

The judgment of the district court is reversed and the cause remanded.

Reversed.

STATE OF NEBRASKA,  
County of Lancaster, ss:

I, H. C. Lindsay, Clerk of the Supreme Court within and for the State of Nebraska and custodian of the records and files thereof, do hereby certify that the foregoing, consisting of pages 1 to 320, inclusive, is a true, full and complete transcript of the records and proceedings, including the final judgment and opinion in the Supreme Court of the State of Nebraska, in the case of John O'Hara, plaintiff, v. James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, defendant, No. 23057, the same being an appeal from the District Court of Douglas County, all of which constitute the entire transcript of the proceedings in the cause.

I further certify that plaintiff's exhibits 4 and 5, photos; 3, dummy cap and wire; defendant's exhibits 21, two wires and plug; 20, exploded electric cap; 14, photo; 15, 16 and 17, photos; 18, photo, and 13, pamphlet, Iowa 1919 Workmen's Compensation Law, herein are the original exhibits forming a part of the original bill of exceptions in this case on file in my office and are the exhibits I have been directed by order of the Supreme Court of Nebraska to include herein; and I further certify that pages 321 to 330 hereof are a full and correct transcript of the judgment of reversal and opinion of the Court rendered and filed in said Supreme Court on March 28, 1922, in the case of O'Hara v. Hines, No. 21656, the same being a former appeal of said case from said district court to our said Supreme Court.



Clerk's Certificate.

215

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court at Lincoln, Nebraska, this 1st day of May, 1923.

H. C. Lindsay, Clerk Supreme Court of Nebraska. [Seal of Supreme Court of Nebraska.]

Fees for this transcript:

330 pp. @ 25¢.....	\$82.50
Cert., seal, & bind.....	1.25
	<hr/>
	\$83.75

Paid by C. A. McGaw.

(9411)

## WRIT OF CERTIORARI AND RETURN—Filed July 23, 1923

UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Agent of the President, under Section 206 of the Transportation Act, 1920, is appellant, and John O'Hara is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court of Douglas County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court, and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

STATE OF NEBRASKA,

*County of Lancaster, ss :*

I, H. C. Lindsay, Clerk of the Supreme Court within and for the State of Nebraska and custodian of the records and files thereof, do hereby certify that the foregoing, consisting of pages 1 to 206, inclusive, is a true, full and complete transcript of the records and proceedings, including the final judgment and opinion in the Supreme Court of the State of Nebraska, in the case of John O'Hara, plaintiff, v. James C. Davis, Agent of the President under Section 206 of the Transportation Act of 1920, defendant, No. 23057, the same being an appeal from the District Court of Douglas County, all of which constitute the entire transcript of the proceedings in the cause.

I further certify that pages 208 to 214 hereof are a full and correct transcript of the judgment of reversal and opinion of the Court rendered and filed in the Supreme Court on March 28, 1922, in the case of O'Hara v. Hines, No. 21656, the same being a former appeal of said cause from said District Court to our said Supreme Court.

I further certify that the original exhibits forming a part of the original bill of exceptions in this case, viz.: plaintiff's exhibits 4 and 5, photos; 3, dummy cap and wire; defendant's exhibits 21, two

wires and plug; 20, exploded electric cap; 14, photo; 15, 16 and 17, photos; 18, photo, and 13, pamphlet, Iowa 1919 Workmen's Compensation Law, were, in accordance with the order of the Supreme Court of Nebraska, attached to and made a part of the transcript in the certiorari proceedings in this cause.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court at Lincoln, Nebraska, this 18 day of July, 1923.

H. C. Lindsay, Clerk Supreme Court of Nebraska. (Seal of Supreme Court of Nebraska.)

[File endorsement omitted.]

(213)

(29,609)

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1923**

**No. 326**

**JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER  
SECTION 206 OF THE TRANSPORTATION ACT, PETI-  
TIONER,**

*vs.*

**JOHN O'HARA**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF NEBRASKA**

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[fols. 1 & 2]

Caption omitted

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

JOHN O'HARA, a Minor, by His Next Friend; FRANK J. O'HARA,  
Plaintiff,

vs.

WALKER D. HINES, Director General of Railroads, Defendant

PRÆCIPE—Filed Jul. 19, 1920

To the clerk of said court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 19th day of June, 1920, in a certain cause in the District Court of Douglas County, wherein John O'Hara, a minor by his next friend, Frank J. O'Hara is Plaintiff, and Walker D. Hines, Director General of Railroads, is Defendant.

You will designate the above named plaintiff as Appellant, and above named defendant as Appellee.

Issue notice of appeal for above named Appellee.

J. O. Yeiser, J. C. Travis, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 3] THE STATE OF NEBRASKA, ss:

NOTICE OF APPEAL AND PROOF OF SERVICE—Filed July 26, 1920

To the Sheriff of the County of Douglas:

You are hereby commanded to notify Walker D. Hines, Director General of Railroads, that an appeal has been taken to the Supreme Court of the State of Nebraska by John O'Hara, a minor, by Frank J. O'Hara, his next friend, asking the reversal of a judgment against him rendered on the 19 day of June, A. D. 1920, in a certain cause in the District Court of Douglas County, wherein John O'Hara, a minor, by his next friend, Frank J. O'Hara, was Plaintiff, and Walker D. Hines, Director General of Railroads, was Defendant.

You will make due return of this notice on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 19th day of July, 1920.

H. C. Lindsay, Clerk. (Seal.)

[File endorsement omitted.]

Service of the within Notice of Appeal acknowledged this 22nd day of July, 1920.

Walker D. Hines, Director General of Railroads, Appellee,  
by C. A. Magaw, Attorney.

Supreme Court of Nebraska. Filed July 26, 1920. H. C. Lindsay, Clerk.

[fol. 4]

Caption omitted

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

AMENDED PETITION—Filed April 2, 1920

(Amended Petition omitted, same appearing at page 13, Transcript of Record.)

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

ANSWER—Filed April 12, 1920

(Answer omitted, same appears on page 16, Transcript of Record.)

[fol. 5] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

REPLY—Filed June 29, 1920, as of May 25, 1920

(Reply omitted, same appears at page 19, Transcript of Record.)

[Title omitted]

#### TRIAL ORDER

Upon consideration of the respective applications therefor, it is by the Court ordered that plaintiff be and is hereby given leave to file a reply in the above entitled cause, within one day; and that defendant be and is hereby given leave to amend paragraph six of the answer herein by interlineation and paragraph seven of the answer by adding thereto.



The parties hereto being represented by their respective counsel, thereupon came the following named persons as jurors, to-wit: (names of jurors omitted) who were duly impaneled and sworn, according to law, and thereupon the trial of this cause was continued to Wednesday morning, May 26th, 1920, at nine o'clock.

Afterwards, at the May, 1920, Term of said Court and on the 26th day of May, 1920, an Order was entered herein, as appears on Page 152 Journal 180 as follows, to-wit:

[Title omitted]

#### TRIAL ORDER

[fol. 6] Now, on this day, again came the parties hereto by their respective counsel; also came the jury, heretofore impaneled and sworn, and the trial proceeded.

The said jury, having heard the statement of the case by respective counsel and the evidence adduced in part, further hearing of this cause was continued to Thursday morning, May 27th, 1920, at nine o'clock.

[Title omitted]

#### TRIAL ORDER

Now, on this day, again came the parties hereto by their respective counsel; also came the jury, heretofore impaneled and sworn, and the trial proceeded.

The said jury, having heard further evidence adduced, hearing of this cause was continued to Friday morning, May 28th, 1920, at nine o'clock.

Afterwards, on the 28th day of May, 1920, Instructions by the Court were filed herein, which said instructions are in the words and figures following, to-wit:

#### IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

#### INSTRUCTION BY THE COURT

GENTLEMAN OF THE JURY: You are instructed as follows:

You are instructed to return a verdict for the defendant.

Given. Charles A. Goss, Judge.

By the Court.

Charles A. Goss, Judge.

[File endorsement omitted.]

[fol. 7] IN DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

PLAINTIFF'S EXCEPTIONS TO INSTRUCTION

Comes now plaintiff and upon reading the instruction given by the Court and before they retired to deliberate and in the *and in the* presence of the court and jury excepted to the one instruction given by the Court to-wit, Instruction number one.

John O. Yeiser, John C. Travis, Attys. for Plaintiff.

Exception duly taken and acknowledged by the Court.

Charles A. Goss, Judge.

[File endorsement omitted.]

IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

VERDICT AND JUDGMENT—May 28, 1920

Now, on this day, again came the parties hereto by their respective counsel; also came the jury, heretofore impaneled and sworn, and the trial proceeded.

The said jury, having heard the remaining evidence adduced, thereupon were instructed, upon the court's own motion, to return verdict for defendant, which said verdict was as follows, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

[fol. 8]

Verdict

We, the jury duly empaneled and sworn in the above entitled cause, do find for the said defendant.

Ernest H. Schmidt, Foreman.

Whereupon said jury was discharged from further consideration of this cause.

It is Therefore Considered, Ordered and Adjudged by the Court that the defendant go hence without day, and have and recover of and from the plaintiff herein his costs of suit herein expended, taxed at \$—.

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

## MOTION FOR NEW TRIAL—Filed May 31, 1920

Comes now the above named plaintiff and moves the Court for a new trial for the following reasons:

1. The Court erred in sustaining defendant's motion for a dismissal of the action for the reason that said decision is not sustained by sufficient evidence.

2. The Court erred in sustaining defendant's motion for a dismissal of the action for the reason that said decision is contrary to law.

3. The Court erred in sustaining defendant's motion to direct a verdict in favor of defendant.

4. The Court erred in directing the jury to return a verdict in favor of defendant for the reason it is contrary to law.

5. The Court erred in directing the jury to return a verdict in favor of defendant for the reason said decision is not sustained by sufficient evidence.

[fol. 9] 6. The Court erred in directing the jury to return a verdict in favor of defendant.

7. The Court erred in giving Instruction No. 1 to the jury.

8. The Court erred in sustaining defendant's motion for a dismissal of the action.

9. The court erred in dismissing said case.

10. The errors of law occurring at the trial and duly excepted to by plaintiff.

11. Irregularities in the proceedings of defendant in that defendant on or about the 16th day of April, 1920, procured an order in the District Court of Pottawattamie County, Iowa, restraining plaintiff from prosecuting this action; that said restraining order also restrained John O'Hara from further prosecuting this action and that said restraining order was left pending in said court and said action never dismissed and that the same now is pending, though defendant has been enjoined by the District Court of Douglas County, Nebraska, from proceeding further in said suit in Pottawattamie County, Iowa; that the pendency of the Pottawattamie County action has prevented plaintiff from having a fair trial of his action in this Court, and has embarrassed him in obtaining witnesses and preparing his case, and that by the bringing, maintaining and failing to dismiss said Pottawattamie County action the defendant has

been guilty of misconduct to the prejudice of plaintiff's having a fair trial hereof.

John O'Hara, by his next friend, Frank J. O'Hara. J. O. Yeiser and J. C. Travis, His Attorneys.

[File endorsement omitted.]

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IN DISTRICT COURT OF DOUGLAS COUNTY

[fol. 10]

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Entered June 19, 1920

Now, on this day, this cause came on for hearing upon the motion of the plaintiff for an order vacating and setting aside the judgment heretofore entered and for a new trial herein, upon consideration whereof, being fully advised in the premises, it is by the Court Ordered that said motion be, and the same hereby is, overruled, and plaintiff is allowed exceptions thereto with forty (40) days from the rising of the Court in which to prepare and serve a bill of exceptions herein.

---

IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

ORDER FILING REPLY—Entered July 15, 1920

Upon the trial of this cause and on the 25th day of May, 1920, the plaintiff was given leave to file a reply within one day and said cause was thereupon tried by both parties as if said reply were in fact filed. It now appearing that said reply of plaintiff was placed in the files in said case and through inadvertence was not filed in the office of the Clerk of this Court:

Now, on this day, upon application therefor, it is by the Court Ordered that the plaintiff be, and he hereby is, given leave to file his said reply nunc pro tunc, and that it be received and have force and effect as of said May 25th, 1920. July 15th, 1920.

By the Court.

Charles A. Goss, Judge.

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[fol. 11] STATE OF NEBRASKA,  
County of Douglas, ss:

CLERK'S CERTIFICATE

I, Robert Smith, Clerk of the District Court, in and for Douglas County, Nebraska, do hereby certify that the foregoing is a full and

true Transcript of the proceedings and record had in the District Court, containing the Amended Petition, Answer, Reply, Trial Order, Trial Order, Trial Order, Instruction by the Court, Plaintiff's Exceptions, Trial Order, Verdict and Judgment, Motion for New Trial, Order Overruling Motion for New Trial, and Order Granting Leave to File Reply Nunc Pro Tunc in the case of John O'Hara, a minor by his next friend, Frank J. O'Hara against Walker D. Hines, Director General of Railroads appearing of record in said Court.

In witness whereof, I have set my hand and affixed the seal of said Court at Omaha, this 17 day of July A. D. 1920.

Robert Smith, Clerk, by Cornelius Farrell, Deputy. (Seal.)

[File endorsement omitted.]

[fol. 12] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

BILL OF EXCEPTIONS—Filed November 3, 1920

Received from Messrs. John O. Yeiser and J. C. Travis, for examination and amendment, a draft of a bill of exceptions in the case of John F. O'Hara, plaintiff vs. Walker D. Hines, Director General of Railroads, Defendant, tried in the District Court of Douglas County, Nebraska at the regular May Term, 1920.

C. A. Magaw, Attorney for Defendant.

Dated, July 17, 1920.

I herewith return the draft of the bill of exceptions referred to in above entitled case, submitted to me on the 17 day of July, 1920, and propose the following amendments: (None.)

C. A. Magaw, Attorney for Defendant.

Dated, July 21, 1920.

[File endorsement omitted.]

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

NOTICE OF FILING BILL OF EXCEPTIONS

To the above-named defendant and Charles A. Magaw, his attorney:

You are hereby notified that on Thursday, the 29th day of July, A. D. 1920, at ten o'clock A. M. the plaintiff will call up for hearing before Honorable Charles A. Goss, Judge of the above entitled

court, in court room No. 3, of the Court House of Douglas County Nebraska, or as soon thereafter as counsel can be heard, a motion to correct the bill of exceptions in above entitled cause by striking out the word "not" in answer to question numbered 1912, being the answer appearing on the 242 page of said bill of exceptions and being the fifth line from the bottom of said page, and also to strike [fol. 13] the word "not" appearing as being interlined in line five on page 247 of said bill of exceptions and being the first word "not" appearing in the answer to question numbered 1946 for the reason that said words were not in the original bill of exceptions submitted by plaintiff to defendant nor proposed as amendments and for the further reason that the defendant and his attorney and court reporter William S. Heller, unlawfully and without authority of law emasculated said bill of exceptions and changed the same after it had been so submitted and for the further reason that said William S. Heller did not report said part of the record so changed and was not present during the taking of said testimony, the same being, in truth and in fact reported by Myrtle A. Kelley. Said plaintiff will move the court to sign and allow the said bill of exceptions with the elimination of said interlineations, additions and alterations so wrongfully made.

John O. Yeiser, John C. Travis, Atty-. — Plaintiff.

Service of the above notice accepted this 23rd day of July, 1920.  
C. A. Magaw.

MEMO.—July 24, 1920, Bill of Exceptions submitted for settlement. Dispute as to word "not" in Q. 1946 on p. 247. Magaw claims the not should be in & Yeiser & Travis claim it should be absent. Must get Mrs. Kelly's notes. C. A. G.

Sept. 2, 1920. Mrs. Kelly says "not" should be on p. 242 but omitted on p. 247. Goss.

#### IN DISTRICT COURT OF DOUGLAS COUNTY

##### STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto, that the following transcript is a true and complete copy of all the evidence, oral and documentary, introduced on the trial of the within entitled cause, together with all the objections of [fol. 14] counsel thereto, rulings of the court on said objections, and exceptions taken thereto.

Jno. O. Yeiser, J. C. Travis, Attorneys for Plaintiff. C. A. Magaw, Attorney for Defendant.

Dated, July 21, 1920.

I hereby certify that the within record now contains all the evidence offered or given upon the trial of the within case by either party, together with all objections of counsel thereto, rulings of the

court on said objections and exceptions thereto, and on application of the plaintiff herein this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

Dated, Sept. 2, 1920.

Charles A. Goss, Judge.

STATE OF NEBRASKA,  
Douglas County, ss:

IN DISTRICT COURT OF DOUGLAS COUNTY

CLERK'S CERTIFICATE TO BILL

I, Robert Smith, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for said County, do hereby certify that this is the original Bill of Exceptions filed in my office in the cause in said Court, wherein John Frank O'Hara is Plaintiff and Walker D. Hines, Director General of Railroads Defendant.

Witness my signature and official seal this 8th day of September, 1920.

Robert Smith, Clerk, by Charles C. Lang, Jr., Deputy.  
(Seal.)

IN DISTRICT COURT OF DOUGLAS COUNTY

REPORTER'S CERTIFICATE

Omaha, Nebraska, July 10, 1920.

I hereby certify that the following is a full and complete transcript of the original shorthand notes taken by me of the proceedings had during the trial of the within entitled action, and that all exhibits offered in evidence are hereto attached, except Ex. 1 and 2 were offered and attached by reference.

Wm. S. Heller, Official Reporter, Fourth Judicial District,  
Douglas County, Nebraska.

IN DISTRICT COURT OF DOUGLAS COUNTY

(Title omitted)

Be it remembered, that at the May Term, A. D. 1920, of the District Court, held at Omaha, Nebraska, within and for Douglas County, Nebraska, to-wit: on the 25th day of May, 1920, before Hon. Charles A. Goss, Judge, the above entitled case was called for trial, and a jury having been first duly impanelled and sworn, the following proceedings were had, viz.:



The first day was consumed in getting the jury, and the beginning of evidence was at 10:30 A. M. May 26th, 1920.

JOHN FRANK O'HARA, called as a witness in his own behalf, being first duly sworn, testified as follows:

1 Q. State your name?

A. John Frank O'Hara.

2 Q. What is your age?

A. 19.

3 Q. When?

A. The 19th of March, 1920.

(Residue of direct examination omitted; no motions nor objections appear therein.)

#### Cross-examination.

#### Questions by Mr. Magaw:

(Questions and answers omitted; no objections nor motions on behalf of defendant appear in omitted portion.)

170 Q. Where did you live at the time of the accident?

A. What street?

[fol. 16] 171 Q. Yes, your address?

A. 820 8th Avenue.

172 Q. What city?

A. Council Bluffs, Iowa.

173 Q. This accident happened in Council Bluffs, Iowa, did it not?

A. Yes, sir.

(Residue of cross-examination by Mr. Magaw and redirect examination by Mr. Yeiser of this witness is omitted. No objections nor motions on behalf of defendant appear in omitted portion, except the following objection in redirect examination, viz:

225 Q. In talking about the accident after it was over, had you heard your uncle make any statement about the little yellow powder that came out when he was twisting it?

226 Mr. Magaw: Objected to by the defendant as being leading.

227 Question withdrawn.

Witness excused.

EDWARD W. O'HARA, called as a witness in behalf of the plaintiff, and being first duly sworn, testified as follows:

Examination of witness, consisting of direct examination by Mr. Yeiser and cross-examination by Mr. Magaw, and identification, and offer in evidence of Exhibit 1, a cable, and Exhibit 2, portion of rail, is omitted. No objections nor motions on behalf of de-

defendant appear in omitted portion except the following objection, viz:

241 Q. Now, Mr. O'Hara during that time did you ever see any cars that were having their loads transferred where the shipment arose in Iowa and ended in the state of Iowa?

A. I did not.

242 Mr. Magaw: Objected to by the defendant unless he knows. Objection sustained. Answer stricken.

225 Q. From your observation and opportunities of seeing it, did you ever see, during the time you were there, a load transferred on the gantry that originated in Iowa and was to end in Iowa?

A. I did not.

256 Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial, and no proper foundation is laid.

Objection overruled. Defendant excepts.

270 Q. And that cable had to be prepared then as you say for that special load?

271 Mr. Magaw: Objected to by the defendant as being leading and suggestive.

Question withdrawn.

301 Q. And then after you got into the coal car and got it, did you bring it to the foreman?

302 Mr. Magaw: Objected to by the defendant as being leading and suggestive.

Objection sustained.

Witness excused.

[fol. 17] Dr. WM P. WHERRY, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Yeiser and cross and recross-examination by Mr. Magaw is omitted. No objections nor motions on behalf of defendant appear in omitted portion.)

Witness excused.

It being 12 o'clock the court declared a recess to 2 o'clock p. m., Wednesday, same day, May 26th, 1920, after which time all parties being present the following proceedings were had, viz:

EDWARD W. O'HARA, recalled as a witness in behalf of the plaintiff, having been sworn, testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Yeiser and cross and recross-examination by Mr. Magaw, and offer in evidence of Exhibit 3, being a dummy electric cap and wire, and Exhibits 4 and 5 being pictures of gantry crane, is omitted. No objections nor motions made on behalf of defendant appear in omitted portion, excepting the following, viz:

421 Q. At the time I refer to, to the manner of my sitting there, I sat to the west of it with my feet and legs toward the north. My body facing toward the east in front of the indenture on this rail, or in an easterly direction.

422. Mr. Magaw: We object to the question because it is not based on any facts proved in the case. It is a mere statement of counsel.

476. Q. You leave considerable latitude for the difference.

477. Mr. Magaw: Objected to by the defendant as not a proper question.)

Witness excused.

FRANCIS W. O'HARA, called as a witness in behalf of the plaintiff, and after being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Yeiser and cross examination by Mr. Magaw, is omitted. No objections nor motions on behalf of defendant appear in the omitted portion, excepting as follows, viz:

517. Q. During the time you worked there did you ever see any cars that were loaded and started from Iowa which ended in Iowa that were transferred at the gantry?

518. Mr. Magaw: Objected to by the defendant as being incompetent and no proper foundation is laid.

Objection sustained.

522. Q. And in that way was it apparent to you where they came from and where they were going?

523. Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial and calling for the conclusion of the witness, and no proper foundation laid for the question.

Objection overruled. Defendant excepts.

[fol. 18] 524. Q. Now during that time did you ever see a car with any tag, or with any particular kind of goods, from which you could understand that it had started in Iowa and was ending in Iowa?

525. Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial.)

Objection overruled. Defendant excepts.

Witness excused.

---

JOHN FRANK O'HARA, recalled by his counsel, having been sworn, testified as follows:

By Mr. Yeiser:

(Examination is omitted, there being no objections nor motions contained in the omitted portion.)

Witness excused.

---

CHARLES BERG, called as a witness in behalf of the plaintiff, and after being first duly sworn, testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Yeiser and cross examination by Mr. Magaw, is omitted. No objections nor motions are contained in the omitted portion, excepting the following, viz:

635. Q. Your impression was that about that time you had seen a hammer?

A. Yes sir.

636. Mr. Magaw: Objected to by the defendant as being leading and suggestive.)

Objection overruled. Defendant excepts.

Witness excused.

647. The Plaintiff Rests.

648. Mr. Magaw: The defendant now moves the court to dismiss the case for the reason that the plaintiff has not proved facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant under the pleadings and issues in in this case.

The motion is overruled.

To which the defendant excepts.

649. Thereupon the court adjourned the further hearing of this case to 9 o'clock a. m. May 27th, 1920, after which time, all parties being present the following proceedings were had, viz:

650. Thereupon the defendant presented the following evidence:

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[fol. 19] W. M. BATCHELOR, called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, and offer in evidence

of exploded cap marked Exhibit 6, are omitted. No objections nor motions on behalf of defendant appear in the omitted portion.)

Witness excused.

---

W. D. CLIFTON, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions appear in the omitted portion.)

Witness excused.

---

Mr. JOHN TURNER, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions on behalf of defendant are contained in said omitted portion, except the following, viz:

1058. Q. He was not in your way then, was he?

1059. Mr. Magaw: Objected to by the defendant as not proper cross examination, and incompetent and immaterial.

Objection sustained.

1060. Q. You are interested in doing all that you can, Mr. Turner, to help Mr. Magaw, the attorney for the Union Pacific Railroad Company, are you not?

1061. Mr. Magaw: Objected to by the defendant as not proper cross-examination.

Objection overruled. Defendant excepts.

1062. Q. I say, you are interested. You desire to not offend Mr. Magaw in any way ?

1063. Mr. Magaw: Objected to by the defendant as not a proper question.)

Question withdrawn.

Witness excused.

---

Miss C. M. GRAY, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser is omitted. No objections nor motions on behalf of defendant appear in omitted portion, except the following, viz:

1145 Q. You would not object to just taking a page or a page and a half before the jury, would you?  
[fol. 20] A. Yes, I do.

1146. Mr. Magaw: This is objected to by the defendant as not proper cross-examination.)

Objection sustained.

Witness excused.

CHARLES BERG, called as a witness in behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Charles A. Magaw:

(Examination omitted, there being no objections nor motions contained therein.)

Witness excused.

1173. Mr. Magaw: (NOTE.—Defendant's offer in evidence of Exhibit 7, being title page of supplemental code of Iowa, omitted.)

1174. Mr. Magaw: (NOTE.—Defendant's offer in evidence of Exhibit 8, being Chapter 8-A of Title 12 of Exhibit 7 and being act relative to Employers' Liability and Workmen's Compensation, is omitted.)

1175. Mr. Yeiser: (NOTE.—Plaintiff's objection to Exhibits 7 and 8 is omitted.)

The objection is overruled.

To which the plaintiff excepts.

(See Exhibit 13 which embodies Exhibits 7 to 13.)

1176. Mr. Magaw: (NOTE.—Defendant's offer in evidence of Exhibit 9, being title page of Acts and Joint Resolutions of 37th General Assembly of Iowa, is omitted.)

1177. Mr. Magaw: (NOTE.—Defendant's offer in evidence of Exhibit 10, being page 287 of volume of which Exhibit 9 is title page, is omitted.)

1178. Mr. Yeiser: (NOTE.—Plaintiff's objection to Exhibits 9 and 10, is omitted.)

The objection is overruled.

To which the plaintiff excepts.

(See Exhibit 13 for this offer.)

[fol. 21] 1179. Mr. Magaw: (NOTE.—Defendant's offer of Exhibit 11 in evidence, same being title page of volume entitled "Acts and joint resolutions \* \* \* of Thirty Eighth General Assembly of the State of Iowa" is omitted.)

1180. Mr. Magaw: (NOTE.—Defendant's offer of Exhibit 12 in evidence, same being Chapter 220 of volume of which Exhibit 11 is title page, is omitted.)

1181. Mr. Yeiser: (NOTE.—Plaintiff's objection to Exhibits 11 and 12, is omitted.)

The objection is overruled.

To which the plaintiff excepts.

(See Exhibit 13 for this Exhibit.)

1182. Mr. Magaw: Mr. Yeiser, I will call your attention to Exhibit 13, so marked by the reporter, the title page of which reads as follows: "State of Iowa, 1919 Workmen's Compensation Law. Revised to July 4, 1919 A. B. Funk, Iowa Industrial Commissioner. Published by the State of Iowa, Des Moines." I will ask you if you have any objection to substituting this publication for the statutes and session laws which I have just introduced, Exhibits 7 to 12 inclusive.

1183. Mr. Yeiser: On your statement that it is correct I will accept it, saving to the right of correcting the transcript if it should turn out that there is a mistake, and with the understanding that the objections that were made to the offers of the original Iowa titles and chapters will inhere in this acceptance.

1184. Mr. Magaw: Certainly we will agree to that. We want you to preserve your objection and rights; the purpose of this being to save expense of copying same, and it puts it in concise form.

Exhibit 13 is by this agreement received in evidence and here follows:

[fol. 22]

### EXHIBIT 13

(NOTE.—This exhibit was removed from Bill of Exceptions upon order of Supreme Court of Nebraska to become part of transcript in certiorari proceedings (see Order re Original Exhibits, page 207 Transcript of Record) the said Exhibit 13 appearing in said Transcript beginning at page 142 thereof.)

---

Mr. T. J. AARON, called as a witness in behalf of the defendant and being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions made on behalf of defendant appear in omitted portions, except the following, viz:

1206. Q. I say little pieces of metal?

1207. Mr. Magaw: Objected to by the defendant as being incompetent, immaterial, and not proper cross examination.)

Objection overruled.

Witness excused.



Mr. C. O. SHALBURG, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting only of direct examination by Mr. Magaw, is omitted. No objections nor motions are contained in omitted portion.)

Witness excused.

A. A. VAN NOY, called as a witness in behalf of the defendant, having been first sworn, testified as follows:

(Examination of witness, consisting only of direct examination by Mr. Magaw, is omitted. No objections nor motions appear in omitted portion.)

Witness excused.

Mr. C. O. BEISTLE, called as a witness by the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Magaw and cross examination by Mr. Yeiser, and offer in evidence of Exhibits 14, 15, 16, 17, 18 and 19 being pictures of blasting caps, Exhibit 20 an exploded cap, and Exhibit 21 two wires, are omitted. No objections nor motions made on behalf of defendant appear in omitted portion, excepting the following, viz: [fol. 23] 1354. Mr. Yeiser: The plaintiff offers in evidence this picture found in this bulletin 80, opposite page 38 just identified by the witness, marked Exhibit 22.

1355. Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial and not proper cross-examination.

1388. Mr. Yeiser: We will offer in evidence the detonator box referred to in the picture marked Exhibit 23, opposite page 41 of this Bulletin No. 80 heretofore identified.

1389. Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial.

1391. Mr. Yeiser: The plaintiff offers in evidence the other picture referred to, marked Exhibit 22, to give the jury a chance to see that in connection with the statements of the witness. It is opposite page 38 of Bulletin No. 80 identified.

1392. Mr. Magaw: Objected to by the defendant as being incompetent, irrelevant and immaterial.)

Objection overruled. Defendant excepts.

Witness excused.

Miss C. M. GRAY, recalled by the defendant, having been sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted.

(No objections nor motions made on behalf of defendant appear in omitted portion.)

Witness excused.

---

Z. CUSHING, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions made on behalf of defendant appear in omitted portion, except the following, viz:

1545. Q. What is nitroglycerine?

1546. Mr. Magaw: That is objected to by the defendant as being incompetent, irrelevant and immaterial, and not proper cross-examination.

Objection sustained.

1556. Q. Is that an element that is used?

A. Nitroglycerine is used in the manufacture of explosives.

1557. Mr. Magaw: The defendant objects to this line of questioning as being incompetent, irrelevant and immaterial.

1621. Q. Who sent you the telegram?

A. I do not remember who it was sent it.

1622. Mr. Magaw: I object to this as being incompetent, irrelevant and immaterial.

Witness excused.

---

Mr. O. B. MONAHAN, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

[fol. 24] (Examination of witness, consisting of direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions made on behalf of defendant appear in omitted portion.)

Witness excused.

---

H. A. CAMPBELL, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct and re-direct examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions are contained in omitted portion.)

Witness excused.

A. E. ANDERSON, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions are contained in omitted portion.)

Witness excused.

---

Thereupon the court adjourned the further hearing of this case to 9 A. M. Friday May 28th, 1920, after which the following proceedings were had, viz:

A. E. ANDERSON, a witness heretofore called sworn and examined, is at this time recalled for further direct examination by Mr. Magaw. He testified as follows:

(Examination of witness, consisting of direct and redirect examination by Mr. Magaw and cross examination by Mr. Yeiser, is omitted. No objections nor motions made on behalf of the defendant are contained in the omitted portion.)

Witness excused.

---

H. A. CAMPBELL, a witness, heretofore called sworn and examined, is at this time recalled for further direct examination by Mr. Magaw:

(Examination of witness, consisting of direct and redirect examination by Mr. Magaw and cross and recross examination by Mr. Yeiser, is omitted. No objections nor motions on behalf of defendant is contained in omitted portion.)

Witness excused.

---

[fol. 25] Defendant rests.

Plaintiff rests.

1952. Mr. Yeiser: I overlooked offering the Carlisle tables.

1953. The Court: You may do so now.

1954. Mr. Yeiser: We offer the Carlisle Table of Expectancy for age 18 years, as contained in Cobbey's Annotated Statutes of Nebraska, pages 64-68, which at age 18 years is 42.77 years.

Plaintiff rests.

Defendant rests.

---

#### DEFENDANT'S MOTION TO DISMISS AND ORDER SUSTAINING

1955. Mr. Magaw: I wish to renew my motion made at the beginning of the trial. Comes now the defendant at the close of all the

evidence and moves the court to dismiss this case for the reason that the evidence fails to prove a cause of action against the defendant and in favor of the plaintiff.

The motion is sustained.

To which the plaintiff excepts.

With this the trial closed, there being no further or additional evidence offered by either party hereto.

(End of Bill of Exceptions.)

(File endorsement omitted.)

[fol. 26] (NOTE.—Receipt of John O. Yeiser for record is omitted.)

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

(Title omitted)

BRIEF OF APPELLANT—Filed January 20, 1921

John O. Yeiser, John C. Travis, Attorneys for Appellant.

Statement of Case

(NOTE.—Statement of case omitted.)

Assignment of Error

1. The Court erred in sustaining motion to direct a verdict.
2. The Court erred in instructing the jury to return a verdict.
3. The Court erred in entering judgment dismissing petition on said verdict.
4. The Court erred in overruling motion for new trial.

Argument

(NOTE.—Argument is omitted.)

(File endorsement omitted.)

(End of Brief of Appellant.)

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And thereafter, on the 20th day of January, 1921, there was filed in the office of the Clerk of said Supreme Court, Proof of Service of Brief of Appellant upon appellee, which said Proof of Service is in the words and figures following, to wit:

(NOTE.—Proof of service of brief of appellant is omitted.)

[fol. 27] Thereafter, on the 10th day of February, 1921, there was filed in the office of the Clerk of said Supreme Court, a certain receipt of C. A. Magaw for the record herein, which said receipt is in the words and figures following, to wit:

(NOTE.—Receipt of C. A. Magaw for record is omitted.)

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IN THE SUPREME COURT OF NEBRASKA

(Title omitted)

BRIEF ON BEHALF OF APPELLEE

C. A. Magaw, Thos. W. Bockes, Douglas Smith, Attorneys for Appellee.

Statement of the Case

The omissions and inaccuracies in appellant's statement of the record appear from the following statement of the case:

John O'Hara, a minor, hereinafter referred to as plaintiff, brought this action in the District Court of Douglas County, Nebraska, by his next friend, Frank J. O'Hara, against Walker D. Hines, Director General of Railroads, hereinafter referred to as defendant, to recover \$100,000.00 damages for personal injuries which plaintiff claims he received while employed by the defendant. The action is based upon the Federal Employers' Liability Act.

The case was called for trial May 26, 1920, and on May 28, 1920, at the close of all the evidence, the court directed a verdict for the defendant (Tr. 17 to 21). A motion for new trial was duly filed, which was overruled on June 19, 1920. This is an appeal by the [fol. 28] plaintiff from these rulings.

The plaintiff alleges in his amended petition that the defendant maintained and used for transferring interstate shipments from one car to another, a gantry, which is a large crane, and that the plaintiff was employed by the defendant in the operation thereof. That on September 13, 1919, while so employed, the plaintiff and other employees were engaged in wrapping a wire cable with cloth so as to protect the employees from injury by the jagged ends of the cable with which they were making a sling to be used in transferring a car of poles. That they needed wire with which to tie the cloth to the cable, but that the defendant had neglected to provide it and that "the foreman directed his subordinates to procure wire to complete said work." That thereupon one of the employees sought and found a piece of wire in an empty coal car and "brought it to said foreman, who accepted same and directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition." That the employees

"undertook to use said wire for said purposes which wire had been retained and while the foreman and one of the defendant's employees aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purpose alleged.

"11. Plaintiff alleges that there was a small metal bulb or cylinder on the end of said wire and while engaged in preparing said wire the said bulb exploded.

"12. Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

"13. Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both his eyes will have to be removed."

The plaintiff further alleges that by reason of his injuries he has [fol. 29] sustained damages in the sum of \$100,000.00 for which sum he prays judgment (Tr. 1 to 4).

April 12, 1920, the defendant filed an answer to the amended petition (Tr. 5 to 10), in which he alleged:

\* \* \* \* \*

"The defendant, by way of further answer, denies each and every allegation in the plaintiff's petition contained which is not herein-after expressly admitted to be true.

"4. Defendant admits that at all of the times mentioned in plaintiff's petition he was the duly appointed, qualified and acting Director General of Railroads, and was operating the railroad owned by Union Pacific Railroad Company, and that at various places on Union Pacific Railroad, including Council Bluffs, Iowa, he maintained gantry cranes for transferring both interstate and intrastate shipments from one car to another.

"Defendant further admits that the plaintiff, John O'Hara, was employed by him on September 13, 1919, as a trucker, and that he had been so employed for some time prior thereto.

"Defendant further admits that the plaintiff, John O'Hara, helped other employes of this defendant transfer a carload of steel at the gantry crane in Council Bluffs, Iowa, from one car to another, on September 13, 1919, and defendant alleges that said carload of steel was in transit from Black Rock, New York to Tacoma, Washington, the same having been shipped by the Donner Steel Company from Black Rock, New York, to Tacoma, Washington.

"Defendant further admits that the plaintiff and the other employes after having completed the transferring of the carload of steel hereinbefore referred to intended to transfer a carload of tele-

graph poles at said gantry crane from one car to another, and that said telegraph poles were in transit from St. Paul, Minnesota, to St. Edwards, Nebraska, but defendant alleges that the plaintiff did not assist in transferring said car of telegraph poles and that the same was not transferred until September 14, 1919; and defendant expressly denies that the plaintiff performed any service for him after he and the other employes had finished transferring the carload of steel hereinbefore referred to.

"Defendant further admits that one E. W. O'Hara, who defendant alleges was a fellow servant of the said plaintiff, John O'Hara, sought and found a piece of small wire in an empty coal car, and that the foreman did not examine said wire and did not see and note that there was a cap attached thereto, but defendant expressly denies that the wire was brought to or called to the attention of the foreman, and denies that he accepted the same.

"Defendant further admits that the said E. W. O'Hara cut the cap off the wire, and defendant alleges that after so doing the said E. W. O'Hara was in the act of throwing said cap away when the said John O'Hara requested the said E. W. O'Hara to give him the said cap, and defendant alleges that thereupon the said E. W. O'Hara gave the said cap that had been cut off of said wire to the said John [fol. 30] O'Hara, and that a short time thereafter he exploded the same and injured his eyes, but defendant expressly denies that the said injuries arose out of or in the course or scope of the employment of the said John O'Hara, and denies that he was engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received said cap or when he exploded it and injured his eyes.

"Defendant further alleges that the said E. W. O'Hara was not acting within the scope or course of his employment when he gave the said cap to the said John O'Hara, and that he did not give the cap to the said John O'Hara for his use in connection with the prosecution of the defendant's business in any way, but gave it to the said John O'Hara upon his request, as aforesaid, for the purpose of satisfying the curiosity and personal ends of the said John O'Hara.

"Defendant further alleges that neither he nor any of his agents, servants or employes had any knowledge of the existence of the said cap until its discovery in the empty coal car by the said E. W. O'Hara, and that neither this defendant nor any of his agents, servants or employes had any knowledge as to where the said cap came from or as to how or when the same got into said car.

"For a further defense this defendant alleges that whatever injuries the plaintiff received at the time referred to in his petition were due solely to his own fault and negligence, and not to any negligence on the part of this defendant, his agents, servants, or employes.

"6. For a further defense this defendant alleges that when the plaintiff received and accepted said cap, from the said E. W. O'Hara, the plaintiff assumed the risk of exploding it, and injuring his eyes in the manner in which he did injure them.



"7. Defendant further alleges that the Iowa Workmen's Compensation Law, being Title 12, Chapter 8-A, Supplement to the Code 1913, as amended by the 37th and 38th General Assemblies, was in full force and effect at the time mentioned in plaintiff's petition, and that said Compensation Law is not the same as the Nebraska Employers' Liability Act, and does not contain the following provision: 'Railroad companies engaged in interstate or foreign commerce are declared subject to the powers of Congress and not within the provisions of this Article,' which said provisions are contained in the Nebraska Workmen's Compensation Law.

"— Defendant further alleges that the said Iowa Workmen's Compensation Law differs from the Nebraska Workmen's Compensation Law in many other material provisions and respects and that by the terms of said Iowa Compensation Law, the common law as to master and servant is repealed, and plaintiff has no rights against this defendant unless the same are granted by said Iowa Compensation Law."

On the 29th day of June, 1920, as of May 25, 1920, a reply was filed, which in substance consisted of a general denial of the new matter set forth in the answer. The case was called for trial May 25, 1920. After both parties had introduced their evidence and rested, the court, as hereinbefore stated, sustained the defendant's motion for a directed verdict.

[fol. 31] There are a number of omissions and inaccuracies in the appellant's statement of the evidence, as appears from the following: (Statement of claimed inaccuracies in appellant's statement of evidence is omitted.)

#### Statement of Propositions Sustaining the Judgment of the District Court

This action is brought under the Federal Employers' Liability Act and the rights of the parties must be measured thereby. The plaintiff failed to prove facts sufficient to constitute a cause of action under this act and it was the duty of the court to direct a verdict for the defendant. Therefore, the judgment should be affirmed.

#### Propositions of Law Involved in the Case Relied upon by the Appellant (Appellee)

I. "In an action against the employer under the federal employers' liability act, some specific act of negligence on the part of the employer must be alleged and proved."

(NOTE.—Citation of authority under this proposition is omitted.)

[fol. 32] II. In an action against an employer to recover damages for injuries of an employe alleged to have been caused by the negligence of such employer, the burden is on the plaintiff to show some

act of negligence as the proximate cause of the employe's injuries by a preponderance of the evidence. When in such a case the plaintiff fails to show, by some competent evidence, negligence on the part of the employer, it is the duty of the trial court to direct the jury to return a verdict for the defendant.

(NOTE.—Citation of authority under this proposition omitted.)

III. "To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances."

(NOTE.—Citation of authority under this proposition omitted.)

IV. After an accident has occurred it may be easy to say what would have prevented it; but that of itself does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it. The master's liability depends, not upon what can be seen by everybody after the happening of an accident, but upon what he could have known or anticipated before the occurrence.

(NOTE.—Citation of authority under this proposition omitted.)

V. A master is not liable for the acts of his servants, unless committed in the course of their employment.

(NOTE.—Citation of authority under above proposition omitted.)

[fol. 33] VI. "If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident, justifies any departure from the settled rules of proof resting upon all plaintiffs."

(NOTE.—Citation of authority under above proposition omitted.)

VII. A master is not liable for mere error of judgment, but only for culpable negligence.

(NOTE.—Citation of authority under above proposition omitted.)

#### Argument

This action is brought under the Federal Employers' Liability Act. The sole question for determination is, whether the plaintiff proved facts sufficient to constitute a cause of action.

(NOTE. Residue of argument is omitted.)

Index omitted.  
[File endorsement omitted.]  
(End of Brief of Appellee.)

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And on the same day, to wit, March 30, 1921, there was filed in the office of the Clerk of said Supreme Court proof of service of Brief [fol. 34] of Appellee, which said Proof of Service was in words and figures following, to wit:

(NOTE.—Proof of service of brief of appellee omitted.)

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And on the 31st day of March, 1921, there was filed in the office of the Clerk of said Supreme Court, receipt of J. C. Travis for record herein, which said Receipt is in words and figures following, to wit:

(NOTE.—Receipt of J. C. Travis for record omitted.)

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And on April 26, 1921, and again on May 14, 1921, notices of hearing of said action by the said Supreme Court was mailed to each attorney of record by the Clerk of said Supreme Court, which said notices were in words and figures following, to wit:

(NOTE.—Notices of hearing omitted.)

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And on May 17, 1921, there was filed in the office of the Clerk of said Supreme Court, a request of appellant for oral argument, which said request is in words and figures following, to wit:

(NOTE.—Request of appellant for oral argument omitted.)

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And on the said day, to wit: May 17, 1921, there was filed in the office of the Clerk of said Supreme Court, a request of Appellee for oral argument, which said request is in words and figures following, to wit:

(NOTE.—Request of appellee for oral argument omitted.)

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And on May 23, 1921, there was filed in the office of the Clerk of said Supreme Court, fifteen copies of reply brief of appellant, which said brief was in words and figures following, to wit:

## IN THE SUPREME COURT OF THE STATE OF NEBRASKA

(Title omitted)

No. 21656

## REPLY BRIEF OF APPELLANT

Argument

(NOTE.—Argument is omitted.)

(File endorsement omitted.)

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[fol. 35] And afterwards, to wit, on the 24th day of Mayy, 1921, the following among other proceedings were had and done in said Supreme Court, to wit:

*Jumes* COURT OF NEBRASKA, JANUARY TERM, A. D. 1921, MAY 24

## ARGUMENT AND SUBMISSION

The following causes were argued by counsel and submitted to the Court:

[Title omitted]

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[fol. 36] SUPREME COURT OF NEBRASKA, SEPTEMBER TERM, A. D. 1921, Nov. 18

[Title omitted]

## ORDER FOR REARGUMENT

It is by the court ordered that reargument be had herein at the first session of court in January, 1922.

A. M. Morrissey, Chief Justice.

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[fol. 37] And afterwards, to wit, on the 29th day of November, 1921, there was filed in the office of the Clerk of said Supreme Court a certain receipt of C. A. Magaw for the record herein, which said Receipt is in words and figures following, to wit:

(NOTE.—Receipt of C. A. Magaw for record omitted.)

And afterwards, to wit, on the 3rd day of December, 1921, there was mailed by the Clerk of said Supreme Court notices of hearing to each attorney of record, which said Notice was in words and figures following, to wit:

(NOTE.—Notice of hearing omitted.)

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IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE—Filed December 16, 1921

C. A. Magaw,\* Thos. W. Bockes, Douglas Smith, Attorneys for Appellee.

On November 7, 1921, since the former argument in this case, the Supreme Court of the United States, in the case of *The Alabama and Vicksburg Railroad Company*, Plaintiff in Error and Petitioner, v. *Smith Journey*, has decided that General Orders Nos. 18 and 18a, of the Director General of Railroads are valid. The decision reads as follows:

(NOTE.—Decision omitted.)

The petition in this case was filed February 2, 1920. On March 8, 1920, the defendant filed a motion which, omitting the caption and exhibits attached thereto, reads as follows:

[fol. 38] "Comes now said defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject matter of this action, moves the court to quash the summons herein, and as grounds therefore alleges:

"That General Orders Nos. 50, 50-A, 18, 18-A, and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits "A," "B," "C," and "E," respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that the pretended cause of action set forth in his petition did not arise in said county and state; and that this action is wrongfully brought therein."

The exhibits are omitted from this brief, as they are attached to the answer and set out at pages 11 to 13 of the transcript.

This motion was overruled on March 13, 1920. Thereafter the defendant filed its answer, in which it alleges among other things, as follows:

"Comes now said defendant, Walker D. Hines, Director General of Railroads, and alleges that heretofore and on the 8th day of March, 1920, he appeared specially and objected to the jurisdiction of this court over the person of the defendant and over the subject matter of this action, and moved the court to quash the summons herein on the ground that General Orders of the Director General of Railroads, Nos. 50, 50-A, 18, 18-A and 18-B, copies of which are hereto attached, marked Exhibits "A," "B," "C," "D," and "E," respectively, and made a part hereof, provide that all suits against the Director General of Railroads, as authorized by General Order No. 50-A must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose. That thereafter, and on the 13th day of March, 1919, (1920) the District Court of Douglas County, Nebraska, overruled said motion.

"2. Defendant further alleges that he still objects to the jurisdiction of this court over the person of the defendant and over the subject matter of this action, and alleges that this action is wrongfully brought in said court because the said plaintiff was at no time employed by the defendant in this county or district, and was not injured in said county or district, but injured his eyes in Council Bluffs, Pottawattamie County, Iowa, of which said city, county and state he was a citizen and resident at all the times mentioned in plaintiff's petition; and defendant alleges that under the Acts of Congress and the proclamations of the President of the United States, and under said General Orders Nos. 50, 50-A, 18, 18-A and 18-B, this court has no jurisdiction over the person of this defendant or over the subject matter of this suit and is wholly without jurisdiction to try and de-[fol. 39] termine the matters in controversy herein.

\* \* \* \* \*

The accident happened in Council Bluffs, Iowa, and the plaintiff resided in that city and state at the time thereof, and had lived there for almost twelve years prior to the date of the accident (Qs. 170 to 175, p. 24).

On the date of the accident, September 13, 1919, and at the time this action was commenced, February 2, 1920, the railroads were under federal control and all of the General Orders hereinbefore referred to were in effect. It will be noted that the action was not brought against the railroad, but against "Walker D. Hines, Director General of Railroads." There was no authority for bringing a suit against the Director General of Railroads, except the authority granted by General Orders Nos. 50 and 50-A. General Order No. 18-B, effective May 22, 1919, provides:

"That all suits against the Director General of Railroads, as authorized by General Order No. 50-A must be brought in the

county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; \* \* \*

The Supreme Court of the United States, in the above case, has decided that these orders are valid. The plaintiff resided in Council Bluffs, Iowa, at the time of the accident and it occurred in that city and state during the federal control of railroads. The District Court of Douglas County, Nebraska, in which the plaintiff brought his suit, was without jurisdiction.

C. A. Magaw, T. W. Bockes, D. F. Smith, Attorneys for Appellee.

[File endorsement omitted.]

[End of Supplemental Brief of Appellee.]

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And on the same day, to-wit, on the 16th day of December, 1921, there was filed in the office of the Clerk of said Supreme Court a certain Proof of Service of said Supplemental Brief of Appellee upon Appellant, which said Proof of Service was in words and figures following, to-wit:

[fol. 40] [NOTE—Proof of Service is omitted.]

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SUPREME COURT OF NEBRASKA, SEPTEMBER TERM, A. D. 1921

[Title omitted]

ORDER GRANTING APPELLEE LEAVE TO FILE SUPPLEMENTAL BRIEF  
—Entered December 16, 1921

On application in open court, it is by the court ordered that appellee be, and hereby is, given leave to file supplemental brief herein instantan.

A. M. Morrissey, Chief Justice.

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And thereafter, to-wit, on the 21st day of December, 1921, there was mailed by the Clerk of said Supreme Court certain notices of hearing to each attorney of record, which said Notice was in words and figures following, to-wit:

[NOTE.—Notice of hearing omitted.]



And, on the said day, to-wit, the 21st day of December, 1921, there was filed in the office of the Clerk of said Supreme Court, receipt of J. C. Travis for record herein, which said Receipt is in words and figures following, to-wit:

[NOTE.—Receipt of J. C. Travis for record omitted.]

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IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

[fol. 41] MOTION OF APPELLEE FOR LEAVE OF COURT TO FILE  
SUPPLEMENTAL TRANSCRIPT—Filed December 23, 1921

Comes now Walker D. Hines, Director General of Railroads, Appellee in the above entitled action, and moves the court for an order granting him leave to file an additional transcript in the above entitled action, containing the Petition, Summons, Sheriff's Return to Summons, Special Appearance and Motion to Quash, and Order of the Court Overruling said Special Appearance and Motion to Quash.

C. A. Magaw, T. W. Bockes, D. F. Smith, Attorneys for Appellee.

[File endorsement omitted.]

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IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

NOTICE OF MOTION—Filed December 23, 1921

To the above-named appellant, and his attorneys of record, John O. Yeiser and J. C. Travis:

You are hereby notified that Walker D. Hines, Director General of Railroads, Appellee in the above entitled action, will file a motion therein, in the Supreme Court of Nebraska, for leave to file a supplemental transcript containing the Petition, Summons, Sheriff's Return to Summons, Special Appearance and Motion to Quash, and Order Overruling same. Copy of said motion is hereto attached, marked Exhibit "A," and made a part hereof.

You are further notified that the said appellee will call said motion for hearing before the Supreme Court of the State of Nebraska, at 10 o'clock A. M., January 3, 1922, or as soon thereafter as the same can be heard.

C. A. Magaw, T. W. Bockes, D. F. Smith, Attorneys for Appellee.

[NOTE.—Exhibit "A," being copy of motion hereinbefore set forth, and Proof of Service on appellant omitted.]

[File endorsement omitted.]

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

[Title omitted]

OBJECTION AND MOTION—Filed January 2, 1922

Comes now appellant and first objects to allowing appellee to file additional transcript offered because it merely encumbers the record and is not material to a decision of the questions presented on appeal, and is an effort to have matter unlawfully injected as part of a transcript which alleged combined special appearance and showing could only be preserved in the Bill of Exceptions, and

Second, moves the court to strike appellee's supplemental brief from the files for the reason that it is beside the issues presented, encumbers the record, and seeks to perfect a cross-appeal after expiration of time for appeal.

J. O. Yeiser and J. C. Travis, Attorneys for Appellant.

[File endorsement omitted.]

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

[fol. 43]

(Title omitted)

NOTICE

To C. A. Magaw, Thos. W. Bockes, Douglas Smith, Attorneys for Appellee:

You are hereby notified that on the 3rd day of January, 1922, at nine o'clock A. M., appellant will call up his motion and objection, a copy of which is attached, before the Supreme Court held in Lincoln, Nebraska.

J. O. Yeiser and J. C. Travis, Attorneys for Appellant.

Service accepted this 30th day of December 1921.

C. A. Magaw, Atty. for Appellee.

[File endorsement omitted.]

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And, on said date, to wit, January 2, 1922, there was filed in the office of the Clerk of said Supreme Court, fifteen copies of Brief of

Appellant Against Consideration of New Matter, in words and figures following, to wit:

IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

General Number 21656

BRIEF AGAINST CONSIDERATION OF NEW MATTERS

John O. Yeiser, John C. Travis, Attorneys for Appellant.

(NOTE.—Brief of Appellant against consideration of new matters omitted.)

Afterwards, to wit, on the 3rd day of January, 1922, the following among other proceedings were had and done in said Supreme Court, to wit:

SUPREME COURT OF NEBRASKA, — TERM, A. D. 1922, JAN. 3

ARGUMENT AND SUBMISSION

(Entries affecting other matters omitted)

No. 21656. O'Hara v. Hines. Appeal from Douglas County.  
A. M. Morrissey, Chief Justice.

[fol. 44] SUPREME COURT OF NEBRASKA, JANUARY TERM, A. D.  
1922, MARCH 28

[Title omitted]

JUDGMENT OF REVERSAL—Rendered March 28, 1922

(NOTE.—Judgment of reversal omitted. Set out in full at page 208, Transcript of Record.)

And on the same date, to wit, March 28th, 1922, there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant to which the preceding judgment of reversal was entered, which Opinion is in the words and figures following, to wit:

## OPINION

(NOTE.—Opinion omitted. Set out in full at page 209, Transcript of Record.)

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And, thereafter, to wit, on the 9th day of May, 1922, there was issued out of the office of the Clerk of said Supreme Court a certain Mandate in words and figures following, to wit:

## MANDATE

(NOTE.—Mandate omitted. Appears at page 21, Transcript of Record.)

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And, thereafter, to wit, on the 13th day of May, 1922, there was filed in the office of the Clerk of said Supreme Court a certain receipt of Clerk of District Court of Douglas County, Nebraska, for Bill of Exceptions, which said Receipt is in words and figures following, to wit:

## RECEIPT FOR BILL OF EXCEPTIONS

(NOTE.—Receipt of Clerk of District Court of Douglas County for Bill of Exceptions is omitted.)

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[fol. 45] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

REPLY BRIEF OF APPELLANT—Filed November 29, 1922

N. H. Loomis, Edson Rich, C. A. Magaw, Attorneys for Appellant.

(Pages 1 to 15, inclusive, of said reply brief omitted.)

(P. 16: The defendant does not claim that the court has acquired no jurisdiction over his person by reason of defects or irregularities in the process or service thereof, but claims that under the orders of the Director General he was privileged from suit in Douglas County, Nebraska, because the cause of action arose in Iowa, of which state the plaintiff was a citizen and resident at the time the cause of action arose. Under the orders of the Director General the defendant was privileged from suit upon the plaintiff's cause of action in all jurisdictions, except Pottawattamie County, Iowa. Actions against the Director General for personal injuries growing out of the federal control of railroads are not transitory but are local under the plain terms of the order.

(Remainder of page 16, and pages 17 to 31, inclusive, of reply brief omitted.)

(File endorsement omitted.)

(End of Reply Brief of Appellant.)

[fol. 46] IN THE SUPREME COURT OF NEBRASKA

CLERK'S CERTIFICATE

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, and custodian of the records and files thereof, do hereby certify that the foregoing, consisting of pages 1 to 44, inclusive, is a true and accurate transcript of the record and proceedings of the Supreme Court of Nebraska in the case Number 21656, wherein John O'Hara is plaintiff v. Walker D. Hines, Director General, defendant, and being the first appeal from the District Court of Douglas County, Nebraska, of an action thereafter appealed a second time, said second appeal being docketed in the Supreme Court of Nebraska as John O'Hara, plaintiff, v. James C. Davis, President under Section 206 of the Transportation Act 1920, defendant, General Number 23057.

I further certify that where proceedings or instruments are referred to herein as being shown in Transcript of Record in case of James C. Davis, Agent etc., Petitioner, v. John O'Hara, Number 1059, October Term 1922 Supreme Court of United States, that I have personally compared the original instrument or proceeding therewith and found same to be a true, full and correct copy thereof.

I further certify that the within transcript is true correct and a complete transcript of all instruments, filings and proceedings, in the order of their occurrence had on said first trial and said first appeal of said action, as the same appear in the bill of exceptions and transcript filed in said Supreme Court of Nebraska and of the proceedings had in said Supreme Court, excepting only omissions shown in parentheses and that said deleted portions are [fol. 47] strictly and in all respects as indicated by said notations within said parentheses; that no instruments or pleadings were filed, nor proceedings had in said first appeal save and except as set forth in this transcript; that this transcript contains in full each and every objection and motion made by defendant, at any time, on the first appeal thereof to the Supreme Court of Nebraska, as are shown in the bill of exceptions filed in my office in said first appeal.

I further certify that page 45 of the foregoing transcript is a true and accurate transcript of the instrument therein set forth, omitting therefrom pages 1 to 15, inclusive, and pages 17 to 31, inclusive, as indicated in parentheses on said page 45, the same being a reply brief of appellant filed in the Supreme Court of Nebraska in case Number 23057, wherein John O'Hara was appellee and James C. Davis, Agent of the President under Section 206 of the Transporta-

tion Act, 1920, was appellant, which said action has heretofore been transcribed to the Supreme Court of the United States upon writ of certiorari.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Lincoln, Nebraska, this 9th day of February, 1924.

H. C. Lindsay, Clerk Supreme Court of Nebraska. (Seal of Supreme Court of Nebraska.)

Costs of this transcript \$15.00.

Paid by John O. Yeiser.

H. C. Lindsay, Clerk Supreme Court of Nebraska.

[fol. 48] Pleas before the Honorable Charles A. Goss, one of the judges and the presiding judge of the District Court of the Fourth Judicial District of the State of Nebraska, at a term thereof within and for the County of Douglas begun and held at the City of Omaha, on the 3rd day of May, A. D. 1920.

Be it remembered, That in a certain cause, heretofore pending in the District Court of Douglas County, State of Nebraska, entitled John O'Hara, a minor by his next friend, Frank J. O'Hara vs. Walker D. Hines, Director General of Railroads, appearing on Docket 172 Number 108 there was filed in the office of the Clerk of said Court on the 9th day of February, 1920, a certain Petition which said Petition is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JOHN O'HARA, a Minor, by His Next Friend, FRANK J. O'HARA,

vs.

WALKER D. HINES, Director General of Railroads

PETITION

(Petition omitted; same appearing at page 2, Transcript of Record.)

Afterward, on the same day, to-wit, on the 9th day of February, 1920, a Præcipe for Summons was filed herein, which said Præcipe is in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## PRÆCIPE FOR SUMMONS

(Præcipe for summons is omitted.)

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Afterward, on the 25th day of February, 1920, a Summons and Return on Summons was filed herein, which said Summons and Return of Summons are in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## SUMMONS AND RETURN THEREON

(Summons and Return on Summons are omitted; same appearing at pages 4 and 5 of Transcript of Record.)

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Afterward, on the 8th day of March, 1920, a Special Appearance and Motion to Quash Summons was filed herein, which said Special Appearance and Motion to Quash Summons is in the words and figures following, to-wit:

## [fol. 49] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## SPECIAL APPEARANCE AND MOTION TO QUASH SUMMONS

(NOTE.—Special Appearance and Motion to Quash Summons is omitted; same appears at pages 6 to 10, Transcript of Record.)

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Afterward, at the February, 1920 Term of said Court and on the 13th day of March, 1920, an Order overruling Special Appearance and Motion to Quash Summons was entered herein, as appears on Page 674 Journal 169, as follows, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ORDER OVERRULING SPECIAL APPEARANCE AND MOTION TO QUASH  
SUMMONS

(NOTE.—Said Order is omitted; same appearing on page 11 of Transcript of Record.)



Afterward, on the 17th day of March, 1920, an Answer was filed herein, which said Answer is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ANSWER

(NOTE.—Answer is omitted; same appearing at page 11, Transcript of Record.)

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Afterward, on the 2nd day of April, 1920, an Amended Petition was filed herein, which said Amended Petition is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

AMENDED PETITION

(NOTE.—Amended Petition is omitted; same appears at pages 13 to 15, Transcript of Record.)

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Afterward, on the 12th day of April, 1920, an Answer to Amended Petition was filed herein, which said Answer to Amended Petition is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ANSWER TO AMENDED PETITION

(NOTE.—Answer to Amended Petition is omitted; same appearing at pages 16 to 18, Transcript of Record.)

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Afterward, on the 24th day of April, 1920, an Attorney's Lien was filed herein, which said Attorney's Lien is in the words and [fol. 50] figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ATTORNEY'S LIEN

(NOTE.—Attorney's Lien is omitted.)

Afterward, at the May 1920 Term of said Court and on the 25th day of May, 1920, an Order Granting Plaintiff Leave to File Reply and Defendant Leave to Amend Answer by Interlineation was entered herein, as appears on Page 151 Journal 180, as follows, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ORDER

(NOTE.—Order is omitted; same appears at page 5, Supplemental Transcript of Record.)

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Afterward, on the said day, to-wit: on the 25th day of May, 1920, there was filed herein Clerk's Jury List, which said Clerk's Jury List is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

CLERK'S JURY LIST

(NOTE.—Clerk's Jury List omitted.)

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Afterward, at the May 1920 Term of said Court and on the 26th day of May, 1920, a Trial Order was entered herein, as appears on Page 152 Journal 180, as follows, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

TRIAL ORDER

(NOTE.—Trial Order omitted; same appears at page 5, Supplemental Transcript of Record.)

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Afterward, at the May 1920 Term of said Court and on the 27th day of May, 1920, a Trial Order was entered herein, as appears on Page 153 Journal 180, as follows, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## TRIAL ORDER

(NOTE.—Trial Order omitted; same appears at page 6. Supplemental Transcript of Record.)

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Afterward, on the 28th day of May, 1920, Instruction of Court was filed herein, which said Instruction of the Court is in the words [fol. 51] and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## INSTRUCTION TO JURY

(NOTE.—Instruction of Court omitted; same appears at page 6, Supplemental Transcript of Record.)

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Afterward, on the 28th day of May, 1920, Plaintiff's Exceptions to Instruction of Court was filed herein, which said Plaintiff's Exceptions to Instruction of Court are in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## PLAINTIFF'S EXCEPTION TO COURT'S INSTRUCTION TO JURY

(NOTE.—Plaintiff's Exceptions to Instruction of Court omitted; same appears at page 7, Supplemental Transcript of Record.)

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Afterward, on the same day, to-wit: on the 28th day of May, 1920, Verdict of the Jury was filed herein, which said Verdict of the Jury is in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## VERDICT OF JURY

(NOTE.—Verdict of Jury omitted; same appears at page 7, Supplemental Transcript of Record.)

Afterward, at the May 1920 Term of said Court and on the 28th day of May, 1920, an Order Instructing Jury to Return Verdict for Defendant was entered herein, as appears on Page 155 Journal 180, as follows, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

ORDER INSTRUCTING JURY TO RETURN VERDICT FOR DEFENDANT

(NOTE.—Order omitted; same appears at page 7, Supplemental Transcript of Record.)

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Afterward, on the 31st day of May, 1920, Plaintiff's Motion for New Trial was filed herein, which said Plaintiff's Motion for New Trial is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

MOTION FOR NEW TRIAL

NOTE.—Plaintiff's Motion for New Trial omitted; same appears at page 8, Supplemental Transcript of Record.)

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Afterward, at the May 1920 Term of said Court and on the 19th day of June, 1920, an Order Overruling Plaintiff's Motion for New [fol. 52] Trial was entered herein, as appears on Page 180 Journal 180, as follows, to-wit:

ORDER OVERRULING PLAINTIFF'S MOTION FOR NEW TRIAL

(NOTE.—Order omitted; same appears on page 9, Supplemental Transcript of Record.)

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Afterward, on the 22nd day of June, 1920, Receipt for Witness Fees was filed herein, which said Assignment of Witness Fees is in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## ASSIGNMENT OF WITNESS FEES

We, the undersigned, for value received, do hereby assign all witness fees due us in the above entitled case to the Union Pacific Railroad Company.

Z. Cushing, 5/28/20; H. A. Campbell, A. E. Anderson, O. B. Monahan, C. P. Beistle, J. E. Turner, Chas. Berg, T. J. Aaron, Wm. Batchelor, W. D. Clifton, A. P. Van Noy.

(File endorsement omitted.)

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Afterward, on July 10, 1920, Jury and Witness List was filed herein, which said Jury and Witness List is in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## JURY AND WITNESS LIST

(NOTE.—Jury and Witness List is omitted.)

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Afterward, on the 16th day of July, 1920, nunc pro tunc as of May 25, 1920, a Reply was filed herein, which said Reply is in the words and figures following, to-wit:

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

## REPLY

(NOTE.—Reply is omitted; same appears at page 19, Transcript of Record.)

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Afterward, at the May 1920 Term of said Court and on the 16th day of July, 1920, an Order Granting Plaintiff Leave to File Reply Nunc Pro Tunc as of May 25, 1920, was entered herein, as appears on page 231 Journal 180, as follows, to-wit:

## ORDER

(NOTE.—Order is omitted; same appears at page 10, Supplemental Transcript of Record.)

[fol. 53] Afterward, on the 8th day of September, 1920, a Bill of Exceptions was filed herein, which said Bill of Exceptions is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

(Title omitted)

BILL OF EXCEPTIONS

(NOTE.—Bill of Exceptions omitted; same as deleted appears, pages 12 to 25, Supplemental Transcript of Record.)

Thereafter, on the 10th day of May, 1922, a Mandate from the Supreme Court of Nebraska was filed herein, which said Mandate from the Supreme Court of Nebraska is in the words and figures following, to-wit:

MANDATE

(NOTE.—Mandate omitted; same appears at page 21, Transcript of Record.)

[fol. 54] STATE OF NEBRASKA,  
County of Douglas, ss:

CLERK'S CERTIFICATE

I, Robert Smith, Clerk of the District Court, in and for Douglas County, Nebraska, and custodian of the records and files thereof, do hereby certify that the foregoing is a full and true transcript of all proceedings and record had in the District Court, consisting of a Petition, Præcipe for Summons, Summons and Sheriff's Return to Summons, Special Appearance and Motion to Quash Summons, Order Overruling Special Appearance and Motion to Quash Summons, Answer, Amended Petition, Answer to Amended Petition, Attorney's Lien, Order Granting Plaintiff Leave to File Reply Instanter and Defendant to Amend Answer by Interlineation and Addition, Clerk's Jury List, Trial Order, *Trial Order*, Instruction of Court, Plaintiff's Exceptions to Instruction of Court, Verdict of Jury, Trial Order Directing Jury to Return Verdict for Defendant, Motion for New Trial, Order Overruling Plaintiff's Motion for New Trial, Receipt for Witness Fees, Jury and Witness List, Reply, Order Granting Plaintiff Leave to File Reply Nunc Pro Tunc as of May 25, 1920, Bill of Exceptions, as deleted, in case of John O'Hara, a minor by his next friend, Frank J. O'Hara against Walker D. Hines, Director General of Railroads appearing of record in said Court.

I further certify that the foregoing contains each and all of the instruments filed, proceedings had and orders made in said action from the date of its being instituted, to-wit: February 9, 1920, to

and including Mandate of Supreme Court of Nebraska filed in said District Court of Douglas County on May 10, 1922, and that said transcript is true and correct and complete transcript of all instruments, filings and proceedings, in the order of their occurrence from said 9th day of February, 1920, to and including said 10th day of May, 1922; excepting only omissions shown in parentheses and that said deleted portions are strictly and in all respects as indicated by said motions within said parentheses; that no instruments or pleadings were filed, nor proceedings had in the District Court of Douglas County, Nebraska, in said action, between said 9th day of February, 1920, and said 10th day of May, 1922, inclusive, except as set forth in this transcript.

I further certify that where proceedings or instruments are referred to herein as being shown in "Transcript of Record" that [fol. 55] reference is made to Transcript of Record in case of James C. Davis, Agent etc., Petitioner, v. John O'Hara, Number 1059, October Term 1922 Supreme Court of United States; and where reference is had herein to "Supplemental Transcript of Record" reference is made to Supplemental Transcript of Record of Supreme Court of Nebraska in case of John O'Hara, plaintiff v. Walker D. Hines, Director General of Railroads, Number 21656, which said Supplemental Transcript of Record is hereto attached.

I further certify that where proceedings or instruments are referred to herein as appearing in Transcript of Record and in Supplemental Transcript of Record that I have personally compared the original instrument or proceeding therewith and found same to be a true, full and correct copy thereof, unless otherwise specifically noted in said parenthesis.

In witness whereof, I have set my hand and affixed the seal of said Court at Omaha this 27 day of February A. D. 1924.

Robert Smith, Clerk. (Seal.)

[fols. 55-56] (File endorsement omitted.)

*End*  
(2225)





IN THE  
**Supreme Court of the United States**

October Term, 1922.

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

JAMES C. DAVIS, AGENT OF THE PRESIDENT,  
UNDER SECTION 206 OF THE TRANSPORTA-  
TION ACT, 1920,

*Petitioner,*

vs.

JOHN O'HARA,  
*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

*To the Honorable, the Supreme Court of the United States:*

James C. Davis, Agent of the President under Section 206 of the Transportation Act, 1920, in support of this, his petition for a writ of certiorari to be directed to the Supreme Court of the State of Nebraska to review a decree of judgment, rendered on the 21st day of February, 1923, which affirmed the judgment of the District Court of Douglas County, Nebraska, entered on the 5th day of June, 1922, upon the verdict of a jury, for \$46,840.11, upon the condition that all in excess of \$37,500.00 be remitted, which was done, respectfully shows:

J-42964

## I.

That this action was brought by John O'Hara, respondent, under the Federal Employer's Liability Act, February 9, 1920, during the federal control of railroads, in the District Court of Douglas County, Nebraska, against Walker D. Hines, Director General of Railroads, to recover damages for the loss of respondent's eyesight, which was totally destroyed September 13, 1919, by the explosion of an electric blasting cap. The pretended cause of action, upon which the suit is based, arose out of the operation by the President of the railroad of Union Pacific Railroad Company, under the Federal Control Act. The respondent claims that the Director General was engaged in interstate commerce; that he was employed by him in such commerce when injured; that his injuries resulted from the negligence of the employes of the Director General, and that, therefore, he is entitled to recover damages under the above Act, as appears from his amended petition, in which he alleged in substance:

That the respondent was employed by the Director General in the operation of a gantry, which was maintained and used by the Director General for transferring interstate shipments from one car to another. That on September 13, 1919, the respondent and other employes were making a sling out of a wire cable, to be used in transferring a car of poles, and that they were engaged in wrapping the cable with cloth so as to protect the employes from injury by the jagged ends of the cable. That they needed wire with which to tie the cloth to the cable, but that the Director General had neglected to provide it, and that "the foreman directed his subordinates to procure wire to complete said work." That thereupon one of the employes sought and found a piece of wire in an empty coal car and "brought it to said foreman, who accepted same and directed its use by its subordinates without carefully examining the same and neglecting to see and note its dangerous condition." That the employes

"undertook to use said wire for said purposes which wire had been retained and while the foreman and one of the defendant's employes aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purpose alleged.

"Plaintiff alleges that there was a small metal bulb or cylinder on the end of said wire and while engaged in preparing said wire the said bulb exploded.

"Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

"Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both his eyes will have to be removed. (Rec., p. 4.)

## II.

That service of summons was duly made February 12, 1920, in accordance with the provisions of General Order No. 50-A, on E. E. Calvin, an operating official, operating for the Director General the railroad of Union Pacific Railroad Company (Rec., p. 7).

## III.

That while the respondent did not allege in his petition either where the pretended cause of action arose, or where he resided at the time of the accrual thereof, the undisputed fact is, as disclosed by the record, a certified copy of which is presented herewith, that the pretended cause of action arose in Council Bluffs, Iowa, and that the respondent was a citizen and resident of that place when he was injured, when he commenced this action, and when it was tried.

## IV.

That the Director General appeared specially and challenged the jurisdiction of the court, invoking the protection of General Order No. 18-B, which provides "that all suits against the Director General of Railroads, as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, \* \* \*" and moved the court to quash the summons because the action, for the reasons above stated, was wrongfully brought in the District Court of Douglas County, Nebraska, and it was without jurisdiction. The motion was overruled (Rec., p. 9).

In due time the Director General filed his answer to the respondent's amended petition, and in accordance with the practice settled by many decisions of the Supreme Court of Nebraska, set up want of jurisdiction along with his other defenses (Rec., p. 28).

## V.

That the case was tried twice. The first trial resulted in a directed verdict for the defendant. The plaintiff appealed to the Supreme Court and it reversed the case and ordered a new trial. (For copy of the opinion, see page 322 of the record.) The Supreme Court dodged the jurisdictional question on the first appeal and refused to consider it, assigning as its reason therefor the failure of the Director General to file a cross-appeal from the judgment in his favor. (The Nebraska statute only authorizes appeals from a final order, and it is not contended that an appeal should have been prosecuted from the order overruling the Director General's special appearance, because this was not a final order.) There was no final order against him and he had nothing to appeal from, either directly or by cross-appeal.

On the second appeal the court held that the District Court of Douglas County had jurisdiction because the defendant filed the special appearance and motion to quash the summons hereinbefore referred to, and which, omitting the caption and exhibits, reads as follows:

"Comes now said defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein, and as grounds therefor alleges:

"That General Orders Nos. 50, 50-A, 18, 18-A and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits 'A,' 'B,' 'C,' 'D,' and 'E,' respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that the pretended cause of action set forth in his petition did not arise in said county and state; and that this action is wrongfully brought therein" (Rec., p. 9).

The court states in its opinion, referring to the filing of the above motion, that "It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction" (Rec., p. 308). And it is further stated in the opinion that by *filing the above motion and special appearance*, the "Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby

called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done" (Rec., p. 307).

Paragraph 2 of the syllabus, which under the Nebraska practice is the law of the case, reads:

"An action for damages against the Director General of Railroads under the Federal Employers' Liability Act is both local and transitory under General Order No. 18-A, and the District Courts of this state have jurisdiction over the subject-matter of such an action. Where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer" (Rec., p. 298).

## VI.

That when the case was called for trial the second time, May 31, 1922, the plaintiff moved the court to substitute James C. Davis, as Agent, as defendant in lieu of Walker D. Hines, Director General of Railroads, against whom the suit was originally brought. This was the first time that the plaintiff asked for substitution.

When the case was commenced, January 9, 1920, Walker D. Hines was Director General of Railroads. March 11, 1920, Walker D. Hines was designated as Federal Agent in accordance with subdivision (a) of Section 206 of the Transportation Act. May 14, 1920, Walker D. Hines, as such Agent, was succeeded by John Barton Payne, who in turn was succeeded March 6, 1921, by James C. Davis.

The first trial commenced May 26, 1920, at which time John Barton Payne was both Director General and Agent.



The case was decided in the Supreme Court of Nebraska the first time March 28, 1922, at which time James C. Davis was Agent.

The defendant objected to such substitution on the ground that the court had no jurisdiction of the action, and on the further ground that the substitution was not made within the time prescribed by Section 1594, Volume 3, U. S. Compiled Statutes 1916, 30 Stat. L. 822, which limits the time within which such substitutions can be made to 12 months. The court overruled the objection and the substitution was made (Rec., p. 73, par. 8).

We have not overlooked the Winslow Bill, which authorizes and validates substitutions after 12 months in cases *properly commenced*. The present case, however, was commenced contrary to the provisions of General Order 18-B, and was, therefore, not *properly commenced*. Since it was not properly commenced and was not properly pending when the Winslow Bill passed, substitution is not authorized by that Act.

Although the question as to whether or not the substitution was properly made was duly raised by the record and presented to the Supreme Court of Nebraska, it ignored the question and made no mention of it in its opinion; but since it affirmed the judgment of the District Court, its decision amounts to a holding that the substitution was properly made.

## VII.

That the record shows that John O'Hara, the respondent, was employed by the defendant at a gantry, or traveling crane, pictures of which are attached to the record as Exhibits 4 and 5, pages 98 and 99, in Council Bluffs, Iowa, on the day of the accident; that the gantry was used to transfer heavy shipments, moving in interstate commerce,

from bad order to good order cars, but the record does not show that it was used exclusively for such purpose; that there were five men employed to operate the gantry, viz.: John Turner, who was the foreman; John O'Hara, the plaintiff; his uncle, Ed. O'Hara; his cousin, Francis O'Hara, and Charlie Berg. The gantry was provided with a supply of ropes and chains which were required to fasten the material to be moved to the hoist of the gantry. Foreman Turner operated the crane; the other men fastened and unfastened the chains or ropes to the shipments.

The evening prior to the accident a carload of steel, moving in interstate commerce, was set at the gantry to be transferred into another car. The men commenced work on the morning of the accident at eight o'clock and finished transferring this car of steel at 10:30 or 11:00 o'clock. No other cars had been set at the gantry and the men had no other duties to perform until this was done, except to hold themselves in readiness to transfer another car when set to the gantry by the switch crew.

The foreman knew that he would be called upon to transfer a car of telegraph poles, moving in interstate commerce, as soon as it was set at the gantry. He decided that while the men were waiting for the switch crew to set this car of poles, or some other car, he would make a cable sling out of a discarded cable which he had on hand; that when completed the cable sling would be used in lieu of the ropes or chains in transferring the car of telegraph poles, as well as any other shipments of poles or lumber that he was called upon to transfer in the future. In other words, the foreman decided to make the cable sling for general use whenever occasion required. Two of the men procured the cable and cut off a piece about 30 feet in length; another man procured U-bolts. The ends of the cable were lapped and clamped together with these bolts. As the work progressed, the men observed that each end of the cable was jagged and, in order to protect their hands from injury,

they decided to wrap each of these ends with a cloth. No material had been specially provided for this purpose. The foreman gave a general order to procure cloth and to find a suitable piece of wire or string to bind it to the cable. E. W. O'Hara recalled seeing some wire in the coal car, from which they had transferred the steel, and went and got it. When he picked it up, he discovered that it consisted of two strands of small, insulated wire about five or six feet in length and that there was a small, metal cylinder attached thereto. Similar wires and cap are attached to the record as Exhibit 3 at page 121. When E. W. O'Hara got out of the coal car with the wire, Foreman Turner was coming down out of the crane. E. W. O'Hara held the wire up and said to Turner, "I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is."

The foreman did not see the cap, and E. W. O'Hara was the only one who knew of its existence at that time. He attempted to sever the cap from the wires by twisting them and, failing in this, proceeded to cut off one of the strands near the cap by laying the strand across a piece of iron and striking it with a hammer. After he had done this, he took the cap with the other strand still attached thereto and hung it in the tool house. He then tied one cloth to the cable with the strand that he had cut off. After he finished this, he got the other strand and severed the cap from it in the manner above stated for the purpose of tying on the other cloth with the remaining wire. After he cut it off he was in the act of throwing the cap away when John O'Hara, the respondent, asked him what he had; to which he replied that he did not know, but it looked like a firecracker. Thereupon John O'Hara reached for the cap and E. W. O'Hara gave it to him. John O'Hara testified that there were still five or six inches of wire attached to the cap, or perhaps a little more, and that it was crumpled up; that he desired to straighten it for use in tying on the cloths, and that he held the cap in his left hand and pulled on the wires with his right hand to

straighten them; that the cap slipped out of his left hand, whipped around and struck the rail upon which he was sitting, and exploded, the discharge striking him full in the face and destroying his eyesight. He was not doing anything immediately prior to the time he took the cap and had not been looking for wire or assisting the other men in tying the cloths to the cable.

E. W. O'Hara, plaintiff's witness, testified—and his testimony is not disputed—that he did not intend to make any further use of the cap or the small portion of wire that was still attached thereto, and that the only reason he gave it to his nephew, the respondent, was because he asked him for it.

The undisputed evidence further shows that neither Foreman Turner, E. W. O'Hara, nor any of the other men had ever seen an electric blasting cap before, and that they did not know what it was and did not know that it was explosive or otherwise dangerous; that no explosives of any nature were used on the premises, and that none were used in that vicinity; that the gantry was equipped with the usual and ordinary appliances, and that it was not out of repair.

The sling was not completed prior to the accident. The foreman testified that he did not remember of using it at any time after the accident. The accident happened on Saturday. No cars were transferred after the accident on that day; none were transferred on the following day, which was Sunday. On Monday, the 15th, nine loads of steel were transferred, but the men did not use the cable in transferring them. The men started to transfer the car of telegraph poles on the 15th and finished it on the 16th. They did not use the cable in transferring the poles.

The plaintiff testified that he did not say anything to Foreman Turner about having the wire or cap; that he did not call Mr. Turner's attention to the fact that the wire had a cap or cylinder on the end of it, and that so far as he knew, Turner had no knowledge of this fact.

None of the men were watching the plaintiff when he received the cap and exploded it, except Charles Berg. He testified that he was about six feet from the respondent when the explosion occurred and was not doing anything; that he saw John O'Hara tapping on the rail with a hammer immediately before the explosion.

A number of experts of unquestioned ability and integrity testified on behalf of the defendant—and their testimony is undisputed—that electric blasting caps are used commercially by labors in mines and other places where blasting is done; that the caps will not explode from concussion unless they receive a blow of sufficient force to indent the shell; that in handling the caps the men whip them out and that they frequently strike stone and hard substances and that in all their experience they never knew of an explosion to occur from such a blow. The undisputed testimony of the experts further shows that they made tests to see how much of a blow the caps would stand without exploding. The testimony in regard to this is shown by Questions 1402 and following, page 242. See also the pictures attached to the record as Exhibits 14, 15, 16, 17 and 18, pages 244, 246 and 248. The expert witnesses further testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question.

#### VIII.

That the Supreme Court of Nebraska erred in holding that the District Court of Douglas County had jurisdiction of this action.

The Supreme Court of Nebraska denied the Director General the benefit of General Order No. 18-B because he invoked its benefit. This amounts to holding the order void and its decision is in conflict with *Alabama, etc., Ry. Co. v. Journey*, 257 U. S. 111.

The question as to whether the court had jurisdiction does not depend upon whether or not the defendant appeared but upon the validity of Order 18-B.

This court is not bound by the state court's conclusion that the District Court of Douglas County had jurisdiction by reason of the filing of the motion and special appearance (See *Truax v. Corrigan*, 257 U. S. 312). In the case cited it is said:

"Where the issue is whether a state statute, in its application to the facts specially alleged, and admitted by demurrer, violates the plaintiff's rights under the Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect; it is not bound by the state court's conclusion in this regard, nor by that court's declaration that the statute is merely a rule of evidence."

"The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

*Ward et al v. Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17.

The motion and special appearance did not amount to a general appearance and a waiver of the defendant's rights under General Order No. 18-B.

In paragraph 2 of the syllabus referred to above, the court says that the filing of this special appearance by the defendant "is a voluntary appearance equivalent to the service of summons, and gives jurisdiction over the person of the officer." Summons was duly served on the defendant in the manner prescribed by General Order No. 50-A before the special appearance was filed (Rec., p. 7). If, as the court says, the filing of the special appearance was equivalent to the service of summons, then the filing thereof did not add to the jurisdiction already acquired by the service of summons. The ruling of the court amounts to holding that the Director General cannot invoke the benefit of General Order 18-A in any case in which he has been duly and regularly served with summons in the manner specified by General Order No. 50-A.

"Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form." 4 C. J. 1317; Bankers Life Insurance Co. v. Robbins, 59 Neb. 170.

Where the party alleges in his pleading that he appears specially for the purpose only of objecting to the jurisdiction of the court over his person or over the subject-matter of the action, or both, for certain assigned reasons the court looks to the "assigned reasons" to determine the true character of the pleading. In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, cited approvingly by the Supreme Court of Nebraska in its opinion in this case, the court says (p. 273):

"The pleading filed in the court below states, 'Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject-matter or of the person of the defendant for the following reasons'; whereupon the reasons are set forth, ten in number. We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the 'reasons assigned,' there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court.'"  
\* \* \* "With these considerations in view, we turn to the 'reasons assigned.'"

The court thereupon considers "assigned reasons" 5 and 7 and holds that they amount to a general appearance. The court did not determine the question as to whether the appearance was general or special from the recitation in the formal part of the motion quoted above, but determined it solely from the "reasons assigned" therein. The question in that case was whether the summons had been properly served. This was not the question in the present case, as summons was duly served.



An examination of the special appearance and motion to quash in this case shows that the only "reason assigned" in support of the statement that the court has no jurisdiction over the person of the defendant or over the subject-matter of the action, is that by reason of the general orders of the Director General of Railroads this action is wrongfully brought in Douglas County, Nebraska. The motion simply invokes the protection of General Order 18-B. If by invoking the protection of the order the Director General waived it, he had as well not made it.

It further appears from the court's opinion and the authorities cited in support thereof that the court places this case in the class of cases where it is claimed that the court has acquired no jurisdiction over the person of the defendant by reason of defects or irregularities in the process, or service thereof, in which class of cases the rule of practice for the defendant is by special appearance to object to the jurisdiction, "and if he goes further and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived." The present case does not fall within this class, but falls within the class of cases "where, for some reason, the defendant is privileged from suit in the county where he is sued," notwithstanding he is properly served with summons. In this class of cases the defendant may, though he is not required so to do, appear specially and move to have the service quashed and, failing in this, he may again set up want of jurisdiction by answer along with any other defenses he may have. In the latter class of cases the fact that he files, or fails to file, a special appearance is not material.

### IX.

That the Supreme Court of Nebraska erred in holding, as it did hold by affirming the case, that the plaintiff was at the time of his injury engaged in interstate transportation

or work so closely related to it as to be practically a part of it. This court has held that:

"An employe of an interstate railway company who was engaged in the work of cutting a tunnel was not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act \* \* \* since the tunnel, being only partially bored, was not in use as an instrumentality of interstate commerce." (Raymond v. C., M. & St. P. Ry. Co., 243 U. S. 43.)

This court has also held that:

"A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, was not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act \* \* \*, although such station and tracks were designed for use, when finished, in interstate commerce." (New York Central R. Co. v. White, 243 U. S. 188.)

In the opinion in that case the court says:

"Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work. \* \* \*"

In the present case, if it be conceded that the plaintiff was acting within the course or scope of his employment when injured, he was simply engaged in assisting the other men to make a new appliance which, when completed, was to be used on the gantry. The appliance had not been completed before he was injured and was not used prior to the injury. The record affirmatively shows that it was not used for a number of days after the accident.

The decision is not in concord with the decisions of this Honorable Court upon this question.

#### X.

That the Supreme Court of Nebraska erred by holding, as it did hold by affirming the judgment of the District

Court, that there was sufficient evidence to warrant the trial court in submitting either or all of the allegations of negligence to the jury, which are:

- (a) That the defendant neglected to provide wire, repairs, tools and machinery for the proper operation of the gantry.
- (b) That the defendant failed to furnish wire upon said machinery or its appurtenances.
- (c) "That the foreman directed his subordinates to procure wire to complete said work."
- (d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."
- (e) That wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work."

This Honorable Court has repeatedly held that in proceedings brought under the Federal Employers' Liability Act "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery."

It was not negligence, under the circumstances disclosed by the record, to fail "to provide wire" with which to tie the cloth to the cable. It was not negligence for the foreman to tell "his subordinates to provide wire for such work." It was not negligence for the foreman to direct the use of the wire found "without carefully examining the same," and it was not negligence on the part of the foreman to fail "to see and note its dangerous condition."

It is settled law that there was no duty on the part of the employer to inspect a piece of wire which was to be used to tie a cloth to a cable.

It is obvious that such an accident as occurred could not have been anticipated from the failure to have a supply of

wire on hand, and it is also obvious that the foreman could not anticipate that any of the men would be hurt when he told them to get wire and tie the cloth around the cable ends.

"Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not make out a case of negligence upon which an action in damage will lie." (22 L. R. A. (n. s.) 917, 920.)

"To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof and that it ought to have been foreseen in the light of attending circumstances." (78 Neb. 155.)

As above stated, all of the above allegations of negligence were submitted to the jury, and we submit that this was error.

The manner in which the plaintiff came into possession of the cap disproves his contention that it was negligently furnished him for his use in connection with the work which the men were doing. The fact that the plaintiff asked E. W. O'Hara what he had proves that his curiosity was aroused when he saw the cap, and that he wanted it and not the fragment of wire attached thereto. E. W. O'Hara, who alone was procuring the wire and tying on the cloth, had cut off such wire as he needed from the cap, and neither he nor any of the other men had any use for the short piece of wire still attached thereto. E. W. O'Hara intended to throw the cap and the wire attached thereto away, and would have done so except for the fact that the plaintiff asked him to give it to him. This shows that E. W. O'Hara was not acting in the scope or course of his employment when he gave the cap to the plaintiff, and that the plaintiff was not acting within the scope or course of his employment when he asked for and received it.

The record also discloses without contradiction that E. W. O'Hara, the uncle, was not acting within the scope or course of his employment when he gave the cap to the plaintiff. E. W. O'Hara was in the act of throwing the cap away when the plaintiff asked him for it. He did not give the plaintiff the cap to be used by him in the promotion of the defendant's work. E. W. O'Hara did not have the slightest suspicion, or grounds for suspicion, that the plaintiff would attempt to straighten the wire still attached to the cap, or that if he did he would get hurt in doing so. The evidence shows that even an expert would not have anticipated such result. When the plaintiff requested E. W. O'Hara to give him the cap, the latter had no reason to suppose that the former wanted wire to use in the promotion of the defendant's work. The proof, therefore, does not show that the defendant furnished the wire or cap to the plaintiff to be used by him in connection with the work, but on the contrary, shows that he did not.

No instructions had been given to the plaintiff by the foreman, or any one else, to straighten the wire or to detach it from the cap. When the plaintiff undertook to do this, he was not complying with any instructions of the foreman. He did not direct the foreman's attention to the fact that there was a cap attached to the wire. There were no explosives used in or about the premises, and the foreman did not have the slightest reason to anticipate injury to any one in carrying out his orders. Nothing short of prophetic vision could have anticipated the accident of which the plaintiff complains.

The decision of the Supreme Court is at variance with the decisions of this court upon the question as to what constitutes actionable negligence.

## XI.

The Supreme Court of Nebraska erred in deciding as it did by affirming the judgment, that the plaintiff did not assume the risk. This Honorable Court has decided that

"Under the Federal Employers' Liability Act, except in the cases specified in Section 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow-employees, when obvious or fully known and appreciated by him."

The plaintiff testified that he knew that there was no wire in the tool house and that he knew "the foreman directed his subordinates to procure wire." The plaintiff knew as much concerning the dangers, if any, incident to carrying out the above order as the foreman or any of the other men. There was no more reason why the foreman should anticipate that an explosive cap would be found and that the plaintiff would explode it and destroy his eyesight, than there was that the plaintiff himself should anticipate such result. He, therefore, assumed the risk incident to the failure to have wire in the tool house and incident to the carrying out of the above order.

The plaintiff and E. W. O'Hara were the only persons who knew of the existence of the cap before the explosion. They testified that they did not know what it was, or that it was explosive or otherwise dangerous, until the cap exploded. E. W. O'Hara, plaintiff's witness, testified that he told the plaintiff that he did not know what the cap was, but that it looked to him like a fire cracker. He thereby imparted all of the knowledge which he had concerning the cap to the plaintiff. The plaintiff, of course, knew that the cap was not wire. He had not been instructed to straighten wire or to sever it from a cap. There was no reason for the foreman to anticipate that the plaintiff would try to straighten wire which was attached to an explosive cap. If the defendant can be charged with negligence under such circumstances, which we deny, then the plaintiff, by the same process of reasoning, must be charged with assumption of risk.

## XII.

That your petitioner is advised that the jurisdictional question has not been passed upon by your Honorable Court; that until it is passed upon, there will be a confusion and uncertainty with regard to the application of the federal law to the orders of the Director General and doubt concerning the rights and obligations thereunder which ought not to exist.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of Nebraska, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress, known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with said Act.

JAMES C. DAVIS,  
Agent of the President under Section  
206 of the Transportation Act, 1920.  
*Petitioner.*

A. A. McLAUGHLIN,  
N. H. LOOMIS,  
EDSON RICH,  
C. A. MAGAW,  
*Counsel for Petitioner.*



State of Nebraska }  
County of Douglas } ss.

C. A. Magaw, being duly sworn, says that he is one of the attorneys for James C. Davis, Agent of the President, under Section 206 of the Transportation Act, 1920, the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

C. A. MAGAW.

Subscribed and sworn to before me this third day of May, 1923.

MABEL A. BROWN,  
*Notary Public.*

My commission expires September 27, 1924.

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IN THE  
**Supreme Court of the United States**

October Term, 1922.

\_\_\_\_\_  
No. \_\_\_\_\_.

\_\_\_\_\_  
JAMES C. DAVIS, AGENT OF THE PRESIDENT,  
UNDER SECTION 206 OF THE TRANSPORTA-  
TION ACT, 1920,

*Petitioner,*

vs.

JOHN O'HARA,  
*Respondent.*

\_\_\_\_\_  
**BRIEF OF PETITIONER ON PETITION FOR WRIT OF  
CERTIORARI**

\_\_\_\_\_  
**STATEMENT**

The questions involved are:

Whether the court should have held that the District Court of Douglas County, Nebraska, had jurisdiction;

Whether the court should have held that the present defendant could be substituted as defendant, after the expiration of one year, in lieu of the original defendant, Walker D. Hines, Director General;

Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff was not engaged in interstate commerce;

Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff assumed the risk of injury;

Whether the evidence proved any actionable negligence on the part of the defendant;

Whether the court erred in submitting to the jury allegations of negligence not supported by any evidence.

**The District Court of Douglas County, Nebraska, was without jurisdiction.**

Whether or not the District Court of Douglas County, Nebraska, had jurisdiction does not depend upon the question as to whether or not the special appearance and the motion to quash constituted a general appearance. It depends upon the validity of General Order No. 18-B. If the order is valid, the court was without jurisdiction even though the defendant did enter a general appearance, which we deny, by filing the motion to quash the summons.

The Director General was sued in Douglas County. He was duly served with summons. The plaintiff did not reside in that county and his pretended cause of action did not arise therein. Under the plain terms of the order the court was without jurisdiction. The defendant by his motion challenged the jurisdiction. The only question involved was the validity of the order. The question as to whether or not the cause of action was local or transitory was answered by the order itself in plain language. It was not transitory, except within the limits of the order. The very purpose of the order was to make what had theretofore been a transitory cause of action a local cause of action, statutes and decisions to the contrary notwithstanding.

It was not the Director General's purpose to permit some litigants to try cases in jurisdictions other than the

jurisdiction prescribed by General Order 18-B and to deny this privilege to other litigants. The order applied to all alike. It was a war measure. It could not be waived by counsel. The question of jurisdiction does not depend upon nice distinctions as to whether or not the cause of action is transitory, or as to whether or not a general appearance was made in the case. The order was a command of the President of the United States, made by him through the Director General of Railroads during the war, and it had to be obeyed and could not be waived by anybody. War orders were made to be respected and obeyed by everybody and not to be ignored and evaded on technical grounds. The power to waive is the power to disobey, and privates in the ranks, such as counsel, may not disobey the orders of the Commanding General.

It was competent for the Government to couple with its consent to be sued, on causes of action arising out of Federal control, the condition that the suit be brought in the jurisdiction prescribed by General Order No. 18-B. *Alabama, etc. Ry. Co. v. Journey*, 257 U. S. 111.

"The Federal Government had power to deny the right of suing it for acts growing out of its management of railroads or to prescribe terms and conditions for such suits, and when so prescribed they must be complied with." *Bailey v. Hines*, 109 S. E. 470.

✓ "It is now also settled law that during Federal control the operation of railways by the Director General was in substance and effect operation by the United States; that an action against the Director General to recover for injuries due to negligent operation is an action against the United States, and that a liability arises and an action can be maintained only if created and consent by the United States to be sued is given by some specific provision of law. See *Northern Pacific R. R. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593; *Alabama & V. Ry. Co. v. Journey*, 257 U. S. 111, 42 Sup. Ct. 6; *Erie R. R. Co. v.*

Caldwell (6 C.C.A.), 264 Fed. 947; Haubert v. B. & O. Ry. Co. (D. C.), 259 Fed. 361; Hines v. Dahn (8 C.C.A.) 267 Fed. 105, where the cases are collected; also Moon v. Hines, 205 Ala. 355, 87 So. 603, 13 A.L.R. 1020, where also the cases are collected and also commented upon.

"The validity of orders of the Director General modifying statutory and common law rules was sustained by the United States Supreme Court in Missouri Pacific R. Co. v. Ault, and Alabama & V. Ry. Co. v. Journey, above cited." *Sandoval v. Davis*, 278 Fed. Rep. 968, 971.

See also:

*Smith v. Reeves*, 178 U. S. 436.

*Southern Bridge Co. v. U. S. Shipping Board*, 266 Fed. 747, 751.

The defendant challenged the jurisdiction of the court at the first opportunity, on the ground that the suit was not brought in the jurisdiction prescribed by General Order 18-B, and continued to do so at every stage of the proceedings, in accordance with the well settled practice of Nebraska, as appears from the following quotation from *Baker v. Union Stock Yards National Bank*, 63 Neb. 801:

"A succession of well-considered cases has settled the law of this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, *by reason of defects or irregularities in the process, or service thereof*, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. *Omaha Loan & Trust Co. Savings Bank v. Knight*, 50 Neb. 342; *Ley v. Pilger*, 59 Neb. 561. *But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have.* *Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*,



41 Neb. 897; *Herbert v. Wortendyke*, 49 Neb. 182; *Barry v. Wachosky*, 57 Neb. 534, 535; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728. *While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in cases of this character.* No special appearance or preliminary objections were made in *Hurlburt v. Palmer*, *supra*, or *Herbert v. Wortendyke*, *supra*, and the provisions of sections 94 and 96 of the Code of Civil Procedure (Secs. 8610 and 8612, Comp. Stat. 1922) taken together, would seem to make it clear that they were not required. See also *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

The above rule of practice is also held to be correct in the following cases:

*Stelling v. Peddicord*, 78 Neb. 779.

*Hurlburt v. Palmer*, 39 Neb. 158.

*Kyd v. Exchange Bank*, 56 Neb. 557.

*Templin v. Kimsey*, 74 Neb. 614.

Want of jurisdiction is set up by the answer in the present case, along with other defenses (Rec., p. 28).

As stated by Judge Letton in his dissenting opinion in the present case (Rec., p. 311), "cases cited in the opinion as to a general appearance being made, when jurisdiction over the subject-matter of the suit is challenged, are not applicable." For the convenience of the court, we will briefly review the cases cited by the Supreme Court of Nebraska in support of its conclusion:

In *Handy v. Insurance Co.*, 37 Ohio St. 366, and in *Elliott v. Lawhead*, 43 Ohio St. 171, the defendant did not ask to have the summons quashed, but asked to have the case dismissed.

*In re Moore*, 209 U. S. 490, has no application.

In *Midland Contracting Co. v. Toledo Foundry & Machine Co.*, 154 Fed. 797, the court decided that objection to jurisdiction is waived by the defendant "entering a general appearance and asking for an extension of time in which to plead and for a continuance prior to the making of such objection."

In *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, the court held that "the voluntary appearance of the defendant in the federal court after statehood without interposing any objection to the jurisdiction of that court" amounted "to a waiver of the objection \* \* \* that upon the commencement of statehood the action should have been transferred to the proper state court \* \* \*."

*Champion Spark Plug Co. v. Champion Ignition Co.*, 247 Fed. 200, has no application whatever.

In *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 398, the court holds that "where diversity of citizenship exists so that the suit is commenceable in some circuit court, the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits."

In *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, the Government filed a demurrer which raised not only the question of jurisdiction of the subject-matter of the action, but also that of the merits. The court held this amounted to a general appearance.

It *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, the court held, "When a defendant is sued in a circuit court of the United States and pleads to the merits, he waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district."

In *U. S. v. Hvoslef*, 237 U. S. 1, it appears that there was no specific objection made to the jurisdiction before pleading to the merits. The court held that the objection to jurisdiction was waived.

*Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, on rehearing 71 Neb. 273, was a suit brought in Jefferson County, Nebraska, on a benefit certificate issued by a mutual benefit association that had appointed the Auditor of State its Attorney-in-fact upon whom process might be served. An alias summons was served by the sheriff of Jefferson County on the Attorney-in-fact. The defendant moved to quash this service, alleging in his motion "that the court was without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," whereupon the reasons are set forth, ten in number. The court says (p. 273):

"We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the 'reasons assigned,' there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court. \* \* \*

"With these considerations in view we turn to the 'reasons assigned.'"

The court then quotes the fifth and seventh reasons assigned in the motion and says (p. 275):

"The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject matter, and that he has done so both by his averments and by the evidence. And again, the seventh assignment, if it means anything, is a plea of *res judicata* of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization."

In *Summit Lumber Co. v. Cornell-Yale Co.*, 85 Neb. 468, the court followed the Perrine case, holding that the motion filed by the defendant amounted to a general appearance and waived irregularities in the issuance of the summons.

In *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, the court followed the Perrine case, but the motion is in no particular similar to the motion in the present case.

In *Lillie v. Modern Woodmen of America*, 89 Neb. 1, the defendant's motion amounted to a demurrer to the petition.

In *Rakow v. Tate*, 93 Neb. 198, the defendant appeared and filed a cross-appeal, demanding affirmative relief.

In *Legan v. Smith*, 98 Neb. 7, the court held that the attempted special appearance was a general appearance and gave the court full jurisdiction over the person of the de-

defendant. The special appearance is too lengthy to set out herein, but is in no respects similar to the one filed by the defendant in the present case.

In *Maxwell v. Maxwell*, 106 Neb. 689, the court held that in his motion to quash the defendant plead matter "amounting to a demurrer to the petition."

In *State v. Westover*, 107 Neb. 593, 186 N. W. 998, the court followed the Perrine case, but the facts and circumstances involved are materially different from the present case.

We direct the court's attention to the following Nebraska decisions with respect to what constitutes a general or special appearance:

In *South Omaha National Bank v. Farmers & Merchants National Bank*, 45 Neb. 29, paragraph 1 of the syllabus reads as follows:

"An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form."

In *Bankers Life Insurance Co. v. Robbins*, 59 Neb. 170, paragraph 2 of the syllabus reads:

"Whether an appearance is general or special does not depend upon the form of the pleading but upon its substance."

In 4 C. J. 1317, it is said:

"Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form. If the appearance is in effect general, the fact that the party styles it a special ap-

pearance will not change its real character, although it may forestall the ordinary presumption that an appearance is general. Where a special appearance is evidently intended, the court cannot enlarge it and make it general, for the extent to which the defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

An examination of the defendant's motion (Rec., p. 9), in the light of the foregoing decisions, shows that he did not vest the court with jurisdiction by filing it.

In its opinion the Supreme Court of Nebraska says (Rec., p. 309):

"But, aside from these considerations, these facts are relevant. At the first trial motions were made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, but no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

We fail to see how this tends to show that the District Court of Douglas County, Nebraska, had jurisdiction of this case. With respect to the motion referred to by the court, it should be remembered that the District Court sustained it and there was no reason for the defendant to complain further that the court had no jurisdiction. The statement that no objection was made during the trial to the jurisdiction of the court is misleading and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence. We do not understand what bearing the fact that no motion for rehearing was filed has, unless the court wishes to give the inference that the jurisdictional question was not directed to its attention on the first appeal. In order that there may be no mistake concerning this,

we direct attention to the following from the opinion of the court on the first appeal (Rec., p. 329):

"Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now."

The rule of the court has no application whatever to a case of this nature, but only applies to cases where a final order had been entered against the appellee and he desired to have that ruling reviewed. In the present case there was no final order entered against the appellee and the judgment was in his favor and he had nothing to appeal from either directly or by cross-appeal.

The inference made by the above quotation from the opinion on the second appeal that the jurisdictional question was settled by the first appeal is not substantiated by the record.

It is settled law that the case could not be brought to this court from the decision in the first appeal, reversing the case and remanding it for a new trial.

"This court cannot be called upon to review the action of the State court by piecemeal, and even if the judgment does finally dispose of some elements of the



controversy, unless it is final on its face as to the entire controversy this court will not review it."

*Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99;

*Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207;

*Bruce v. Tobin*, 245 U. S. 18.

Apparently the Supreme Court of Nebraska merely *suspended* the rules of practice, settled by its former decisions, and did not overrule them. Whatever may be said as to the character of the defendant's motion, the opinion seems to be "special" and for the purpose of this case only, and not "general." Neither *Baker v. Union Stock Yards National Bank*, 63 Neb. 801, nor any of the many kindred cases, are even mentioned.

The fact is the court arbitrarily refused to give effect to the war order in question and its decision amounts to holding the order void.

This action abated for failure to substitute the successor of **Walker D. Hines**, Director General of Railroads, the original defendant, within one year after he vacated office.

The facts relevant to the substitution are stated in the petition filed herein.

It is our contention that Section 1594, Vol. 3, U. S. Comp. Stat. 1916, 30 Stat. L. 822, limits the time within which such substitution can be made to twelve months. This contention is supported by the following authorities:

*Payne v. Industrial Board of Illinois*, 42 Sup. Ct. 462;

*LeCrone v. McAdoo*, 253 U. S. 217;

*Payne v. Slatinka*, decided by this court January 8, 1923, but not yet reported.

The Winslow Act applies only to actions *properly* brought and, since this action was not properly brought, it does not apply here.

**The verdict is not supported by the evidence.**

(a) Because it does not show that the plaintiff when injured was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

The undisputed evidence showed that the gantry was supplied with the usual number of ropes and chains on the day of the accident (Rec., p. 156, Qs. 704 to 740).

The men were making the cable for handling lumber, poles, or any other wood. They had no cable prior to the accident (Rec., p. 160, Qs. 753 and 754). They were making the sling out of a piece of cable they had in the tool house (Rec., p. 160, Q. 759). The sling was not to be permanently attached to the gantry, but was to be used the same as the chains and ropes with which the gantry was supplied were used (Rec., p. 162, Qs. 771 to 775). The sling was not completed before the accident, and they did not transfer any more cars until two days after the accident, or until September 15th. They did not use the cable in transferring them. They started transferring a car of poles on September 15th and finished it on the 16th and did not use the cable for that purpose (Rec., p. 163, Qs. 775 to 793).

The plaintiff was not engaged in interstate commerce, even if he were assisting the men in making this cable when he was injured, which we deny. The cable which the men were making was a new appliance and had not been devoted to commerce of any kind at the time of the accident. Under the circumstances, the men engaged in making the cable were not engaged in interstate commerce any more than a blacksmith would have been had he been making the cable in question in his own shop.

*Industrial Accident Commission of State of California, et al., v. Payne, Agent*, 42 Sup. Ct. 489, and cases cited therein.

In *New York Central R. Co. v. White*, 243 U. S. 188, the court holds that a night watchman, while guarding materials intended to be used in the construction of a railway station and new tracks, was not engaged in interstate commerce, although the station and tracks were designed for use, when finished, in such commerce.

In *Illinois Central R. R. v. Behrens*, 233 U. S. 473, the court holds that a switchman who handled interstate and intrastate cars indiscriminately, "frequently moving both at once and at times turning directly from one to the other," was not engaged in interstate commerce when engaged in handling intrastate traffic.

In *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, the court held a machinist's helper, while making repairs upon an engine used in hauling both intrastate and interstate freight, was not employed in interstate commerce.

**(b) There was no proof of negligence.**

Before discussing the evidence bearing on this subject, we will briefly review the decisions of the Supreme Court of Nebraska rendered on the first and second appeals.

The first trial resulted in an instructed verdict for the defendant, and the first appeal was an appeal by plaintiff from this judgment. The court decided: "The provisions of the Federal Employers' Liability Act create a liability against the employer for the negligence of a fellow employee of an injured workman," and that it was "error for the trial court to instruct the jury to return a verdict in favor of defendant."

There was no controversy with respect to the defendant's liability for the negligence of a fellow servant. That he is liable for such negligence, if any, is settled by the terms of the Federal Act. The question was whether the evidence

proved facts sufficient to constitute a cause of action under this act.

The court says in its opinion (Rec., p. 326): "In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of the gantry \* \* \*" and the court holds that the question as to whether or not E. W. O'Hara was guilty of actionable negligence, when he let the plaintiff have the cap, was for the jury and reversed the case for this reason.

At the second trial the court by its instructions (See Instructions 1, 2, 3 and 4, Rec., p. 44) submitted all of the alleged acts of negligence set forth in the plaintiff's petition to the jury.

The second trial resulted in a verdict and judgment in favor of the plaintiff for \$46,840.11, and the defendant appealed from this judgment. The record presented the questions hereinbefore referred to.

On the second appeal the court decided among other things:

"There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.

\* \* \* \* \*

"A verdict for \$46,840.11 for an injury resulting in the loss of the sight of both eyes *held*, under the facts in this case, to be excessive, and a recovery of \$37,500 is allowed."

In accordance with the practice, the plaintiff on Febru-

ary 21, 1923, filed a remittitur, remitting all of the judgment in excess of \$37,500, and on that day the court ordered that the judgment of the District Court in the sum of \$37,500 be affirmed (Rec., p. 313).

In due time, and on March 6, 1923, the defendant filed a motion for a rehearing, which was overruled March 30, 1923 (Rec., p. 315).

In its opinion on the second appeal, the court says (Rec., p. 300):

"The principal grounds relied upon for reversal are: that the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.

"Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the Federal Employers' Liability Act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the negligence of the master. The argument in this connection that O'Hara did not give the wire to the plaintiff to promote the defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent. \* \* \*"

The court makes no further mention or comment in its opinion with respect to the defendant's contentions.

The allegations of negligence set forth in the petition are:

- (a) That the defendant neglected to provide wire, repairs, tools and machinery for the proper operation of the gantry.
- (b) That the defendant failed to furnish wire upon said machinery or its appurtenances.
- (c) "That the foreman directed his subordinates to procure wire to complete said work."
- (d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."
- (e) That wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work" (R., p. 28).

"A person is not liable for a mere error in judgment." *O'Neill v. C., R. I. & P. Ry. Co.*, 66 Neb. 638; *Maue v. Erie R. Co.*, 91 N. E. 628.

"There is a plain distinction between the suggestion of a possible precaution by which an injury might probably have been avoided, and the adducing of evidence which shows that the injury was caused by negligence of the defendants. Probably scarcely a mishap occurs where the wisdom which comes after the event cannot suggest some expedient by which, through the exercise of a more abundant caution, the accident might not have been prevented." *Nolan v. Shickle*, 3 Mo. App. 300, 305.

"Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not \* \* \* make out a case of negligence upon which an action in damages will lie." *Ford v. Tremont Lbr. Co.* (La.) 22 L. R. A., (N. S.) 917, 920.

In *Ryan v. Cortland Carriage Co.*, 118 N. Y. S. 56, it is said:

"Failure to guard against that which has never occurred and which is very unlikely to occur, and which does not naturally suggest itself to prudent men as something which should be guarded against, is not negligence.

"After an accident has occurred it may be easy to say what would have prevented it; but that of itself does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it. The master's liability depends, not upon what can be seen by everybody after the happening of an accident, but upon what he should have known or anticipated before the occurrence." *Atoka Coal & Mining Co. v. Miller*, 170 Fed. 584, 586; *Maue v. Erie Co.*, 198 N. Y. 221, 91 N. E. 629.

In *Bryant v. Beebe & Runyan*, 78 Neb. 155, it is said:

"To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances." *McGill v. Michigan S. S. Co.*, 144 Fed. 788 (C.C.A., 9th Circuit, writ of certiorari denied, 203 U. S. 593).

The evidence bearing upon the allegations of negligence is in substance as follows:

On the day of the accident the plaintiff and the men with whom he was working were employed at the gantry, which is a large crane used to transfer heavy shipments from one car to another. The record shows that some of the shipments transferred were moving in interstate commerce, but does not show that the gantry was used exclusively to transfer shipments moving in such commerce.

They finished transferring a carload of steel during the forenoon and had nothing to do until another car was set at the gantry by the switch crew. While they were wait-



ing for this, the foreman decided to make a sling out of a discarded wire cable.

The plaintiff testified (R., p. 76, Q. 33): "The foreman said to get the cable out of the shanty that we had put in there, and to cut off a piece that would be large enough to make a cable sling." This was a general order to the gang. After the cable was cut off, the ends were clamped together with U-bolts (R., p. 78, Q. 50). After this was done "Mr. Turner said that where the coupling (cable) was cut off, the strands of the wire were all loose, and he said it would be better to put a cloth or something around the ends, so that nobody would get their hands hurt when they were handling the sling, and he said to get cloth to wrap around this, and we would have to have some wire to fasten it down with" (R., p. 79, Q. 59). There was no suitable wire in the tool house and this fact was reported to Foreman Turner and "He said to see if we could find some." This order was given "to the gang" (R., p. 79, Qs. 60 to 65). "My uncle (E. W. O'Hara) found some wire in the empty coal car. I did not know where he got it from at the time." He brought the wire up to "where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful of it or there would not be enough of it to do the work with" (R., p. 80, Q. 68). (Exhibit 3, Rec., p. 121, is the same kind of cap and wire). "My uncle cut off a piece to wrap around the cloth, and the other was handed to me. The piece that had the cylinder on it, and the wire that had been crumpled up when he tried to take it off, four or five inches of wire, besides what was crumpled up around in the end of the cylinder. I thought that if they would not have enough of the wire that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on, and I had the cylinder part in my left hand

and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." It exploded and blew my eyes out (R., pp. 80 and 81, Qs. 71 to 76). I did not know what the cap on the end of the wire was. I was going with the wire to help fasten the cloth on so it would stay on better (R., p. 81, Qs. 82 to 85). The first time I saw the cylinder or cap was when my uncle gave me the wire and I started to straighten it. My uncle did not say anything to me and I did not say anything to him when I took the cap. No one said anything to me at that time. Mr. Turner was a few feet away working on the clamps. I did not call his attention to the cap and "I do not suppose he knew I had it" (R., p. 87, Q. 145). No explosives or caps were used in the work and none were kept on the premises.

Francis W. O'Hara, plaintiff's witness, testified that the foreman "told some one to get some cloth" and they got it, but there was no wire (R., p. 104, Q. 281). When Foreman Turner asked some one to get the wire "my father (E. W. O'Hara) told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that" (R., p. 105, Q. 287). "He held it up to the foreman and asked him if it was all right" and the foreman "said it was all right, but there would not be enough of it. My daddy said it will have to be because that is all there is" (R., p. 105, Qs. 297 to 299).

Edward W. O'Hara, plaintiff's witness, testified that during the forenoon he noticed "a piece of wire in the coal car from which he transferred the sheet iron. I did not pay any attention to it" (R., p. 115, Q. 393). There was a car of telegraph poles that we expected to transfer and "the foreman said that they were to fix it right after dinner  
\* \* \* He said that we would have to make a sling out

of a piece of cable, as the rope was not heavy enough to handle them" (R., p. 116, Q. 403). There was a piece of cable in the shanty. "Some of them got this cable out and cut off about what they wanted of it \* \* \*. I was at something else. I did not help take it out or cut it off \* \* \*. It was clamped together with U-bolts. I suggested that we get a cloth and tie it around the end of the cables on account of where they were cut they were so rough that they would tear our hands" (R., pp. 116 and 117, Qs. 406 to 412). The foreman said "we would have to cover it up or we would cut our hands on it and we should tie a cloth on it." This direction was not given to any one in particular. "Well, they got the cloth and had to have something to tie it on with. I said we would have to tie it on with some wire; string would not be heavy enough. We did not have any. So I happened to think of the piece I had seen in this car that I had transferred the sheet iron from. I went in there and got it, and when I got it it had this cylinder on it. I did not know there was a cylinder on it until after I took it up. There was two strands of wire, separate strands of wire coming out of the ends of the cylinder. I tried to twist it off. It did not go and I picked up a hammer that was laying there, and I laid it across the rail and I cut it off. I took one piece with the cylinder and hung it up in the shanty, in the tool house, and the other piece I took down and I and Mr. Berg wrapped it around the cable \* \* \*" (R., p. 117, Q. 418). When I got the wire, "I crawled out of the car with it and Turner was just coming down out of the crane \* \* \* and I was just a little ahead of him, and I held it up, I says, I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is" (R., p. 118, Q. 420) \* \* \* I would not say that Mr. Turner saw the cap. "It would have been very easy to overlook. It was not very large" (R., p. 137, Q. 595). Exhibit 3 is similar to the cap and wire that I had. After Mr. Berg and I had tied one cloth on, I

went and got the other piece and cut it off the cap, leaving about four or five inches attached to the cap. "I started down where Turner was working, where the cable was, and I had the wire in one hand and the cap by the end \* \* \* John was there and I gave it to him. He reached over and took it (R., p. 153, Qs. 455 to 459). I did not know what the cap was and did not make any effort to find out. I said it looked like a fire cracker, but I do not know whether John heard that or not (R., p. 125, Q. 455). After John took the cap, I went right on down to the end of the crane where Turner was working. I worked there a minute or a minute and a half and heard the explosion and heard John scream. I was not over five feet away (R., p. 126, Q. 478).

On cross examination E. W. O'Hara testified: Immediately before the explosion "I was standing down there waiting for them to get the U-bolts tight and had the wire in my hand. John had the cap at that time" (R., p. 133, Q. 547). After I got the wire out of the coal car "I had the cap in the left hand and I tried to pull the wire out. I jerked on it two or three times and it did not come, and I tried to twist it off. It was not heavy. I thought it would twist, but it did not twist. It was too tough. I laid it across the rail like that and hit it with the hammer and cut it off, and I took one part of it, the part that had the cylinder on and I hung it up in our shanty because I was going to use it later, and took the piece that was in my hand and wrapped it around the cable." That tied on one cloth (R., p. 132, Qs. 539 and 540). I later got this strand and cut the cap off to tie the other cloth on (R., p. 133, Q. 551). He testified:

557 Q. What were you going to do with the cap when you cut it off, did you have any use for that?

A. No. I hadn't any use for it (R., p. 134).

564 Q. What were you in the act of doing with the cap after you cut it off and before John took it?

A. I had it in my hand.

565 Q. For what purpose did you have it in your hand?

A. Why, I just had that cut off, of course, is the reason I had it in my hand.

567 Q. What did you do with it?

A. I gave it to John.

568 Q. How did you happen to take it back to John?

A. I don't know. He reached over and took it, I guess. At least I gave it to him.

569 Q. Did you give it to him or did he reach over and take it?

A. Well, kind of both, I guess. When he reached I handed it to him.

570 Q. Did he say anything to you?

A. He wanted to know what it was. He said, what is that? I says, I don't know, it looks like a fire cracker.

571 Q. Is that all that was said?

A. That is all.

At that time John walked over and sat down on the rail and I went on with my work (R., p. 136, Q. 576). It was possibly two minutes after that that I heard the explosion. I did not know what the cap was at the time I gave it to him. I had never seen one before (R. p. 136, Qs. 577 to 581).

581 Q. You had all of the wire that you needed to tie that other cloth on at that time, did you not?

A. I do not know whether I had all I needed. I had about all there was (p. 136).

584 Q. You had cut off all there was. That is all you had, was it not?

A. I cut off the most of it anyhow.

604 Q. What was your purpose in letting John take the cap from you?

A. I had no purpose. I would give it to anybody that would ask for it (p. 137½).

The plaintiff, John O'Hara and his uncle, E. W. O'Hara, both testified that the plaintiff resided in Council Bluffs,

Iowa, at the time of the accident and that the accident occurred in that place (Qs. 121 to 130, p. 85).

John Turner, a witness for the defendant, testified that they used chains at the gantry to transfer sheet iron or steel. That they had chains on the day of the accident; that they had two ropes, an inch and a half rope and a two-inch rope. That this was the ordinary equipment of the gantry (R., p. 158, Qs. 729 to 740). After we finished unloading the steel we did not have any particular duties to perform, except to wait until another car was set. On the day of the accident we made a cable sling after dinner; that is all we did after we finished unloading a car of steel. We made the sling "for handling lumber and poles and anything in that line of wood so in case we had a load of wood we would use the cable, and otherwise if it was steel or iron we used a chain." I had been working there since January, 1919, and there was no cable sling there during that time (R., p. 160, Qs. 751 to 757). "We had a piece of cable in the tool house and I told some of the boys to bring that cable out and cut about 30 or 35 feet off of it, and to make a cable we would have to have some cable clamps to make a sling, and it would be much easier to use than a chain in going around double loads of lumber and telephone poles and anything of that kind in that line, and so they brought the cable out \* \* \* and cut it and put the clamps on and fastened the hoist on and put it around the end of the coal car. We had it fastened to the hook at the top of the crane so you could tighten the nuts on the clamps. Ed. O'Hara was standing by my left side, I believe it was. I had the monkey wrench and was tightening the clamps on the cable when I heard the explosion \* \* \*" (R., p. 161, Q. 759). I did not know there were any explosives on the premises and had not seen this cap and did not know that any one had it. If E. W. O'Hara held the wire up for me to see, I did not see it (R., p. 164 Q. 749).

801 Q. Do you recall what directions, if any, you gave in regard to tying cloth on this cable?



- A. Well, I asked some of the boys if there was any wire, to get some wire, that there was some of that little rope or twine in the car (shanty), that it was all right, and some said the wire was too big. I saw there was an old broom in there, and you can tear the old broom up and use the broom wire, either that or some of this binding twine. That is as far as I know. I do not know where they got the wire, in the shanty or where it came from.

The foregoing is the substance of all of the evidence bearing upon the accident and the way it happened.

O. B. Monahan, employed by the Dupont Powder Company, Wilmington, Delaware; A. E. Anderson, technical representative for the Dupont Powder Company; C. P. Beistle, chief chemist for the Bureau of Explosives, and who for six years was assistant chemist for the Bureau of Ordnance of the War Department, and H. A. Campbell, an inspector for the Bureau of Explosives, all qualified as experts and testified on behalf of the defendant. Each of these witnesses testified that he had had experience in handling explosives of various kinds and that he had handled and was familiar with the proper method of handling electric blasting caps such as the one the plaintiff exploded.

Mr. C. P. Beistle made tests of the blasting caps "to see how much they would stand in rough handling." He made a device, a picture of which is shown at page 244, Exhibit 14, and with this appliance allowed a weight to strike the cap so as to indent the same at the loaded end, as shown by Exhibits 15, 17 and 18, at pages 246 and 248 of the record. Mr. Beistle testified that he also "took some of these electric blasting caps that were packed ready for transportation, and we took a box up on top of a cliff and just threw the whole box over, and it fell down about forty feet and struck the rocks on the bottom and broke the wooden box all to pieces, and some of the paste-board cartons, or inside boxes were broken open, and many of the caps came out, but none were exploded" (R., p. 249, Q. 1419).



All of the expert witnesses testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question. The experts also testified that the electric blasting caps such as the plaintiff was injured with are used commercially; that when the caps are furnished to the employee who is to use them the wires attached thereto are folded; that the men unfold the wires by "whipping" them out, and that in doing so they frequently strike hard substances and are subjected to blows similar to the blow which the plaintiff testified he accidentally gave the cap with which he was injured. That in all of their experience, ranging over many years, they never heard of a cap exploding from such a blow. They further testified that the electric blasting cap could not be exploded in ordinary handling or in the manner plaintiff claimed; that while they would explode from concussion, it required a blow sufficient to indent the shell to explode the cap.

No foresight short of prophetic vision could even have suggested the finding of the cap, and consequently it is impossible to presume that a man of ordinary prudence would have taken thought to prevent it. The defendant was not called upon to apprehend the occurrence of an extraordinary mishap which he could not have reasonably contemplated as a probable consequence of the work which the men were doing. Therefore, the inquiry is not whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether under the circumstances disclosed by the evidence he was guilty of negligence in failing to anticipate the accident and provide against its occurrence. It was not negligence to undertake to make the sling. There were no more dangers, so far as human foresight could foresee incident to wrapping the cable with cloth and tying it with wire than are incident to the ordinary walks of life or to the ordinary games of childhood. This work commonly and generally could have been done without the slightest

risk and would have been completed without mishap in this case but for the finding of the cap. E. W. O'Hara was innocently ignorant that there was any danger, either in getting the wire from the car or in using it after he got it. This is established, not only by his positive testimony to that effect, but by the manner in which he handled the cap and wire. He had not the slightest reason to believe or to suspect that the plaintiff would injure himself with the cap when he asked for and took it. There was, of course, no duty on the part of E. W. O'Hara or the other men to have knowledge of these caps and knowledge cannot be imputed to them. Their conduct must be judged in the light of their actual knowledge concerning it. However, if E. W. O'Hara had possessed the knowledge of an expert, he would not have hesitated to let the plaintiff have the cap under the circumstances disclosed by the evidence. The undisputed testimony of the experts referred to above so shows.

In proceedings brought under the Federal Employers' Liability Act, "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery." *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367. At page 371 of the opinion in the Harris case the court says:

"The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. The Nitro-Glycerine Case, 15 Wall. 524, 537; Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 663; Looney v. Metropolitan R. R. Co., 200 U. S. 480, 487; Southern Ry. Co. v. Bennett, 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 501, 502; Southern Ry. Co. v. Gray, 241 U. S. 333, 339; Erie R. R. Co. v. Winfield, 244 U. S. 170, 172; New York

Central R. R. Co. v. Winfield, 244 U. S. 147, 150. These established principles and our holding in Central Vermont Ry. Co. v. White, 238 U. S. 507, 511, 512, we think, make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The Nitro-Glycerine Case 15 Wall. 524, cited approvingly by the court in the Harris case was an action for damages caused by the explosion of nitro-glycerine while employees of an express company were opening the case containing it, to repair a leak therein. They did not know what it was or that it was dangerous. The court held that there was no liability. At page 536 of the opinion the court says:

"The defendants being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. 'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.

\* \* \* \* \*

"Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer of his misfortune."

In *Cleghorn v. Thompson*, 62 Kans. 727, 64 Pac. 605, the court quotes approvingly from *Pollock on Torts* as follows:

“‘Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon freedom of action as materially to check human enterprise’.”

In the same opinion the court quotes approvingly as follows from *Thompson on Negligence*:

“‘It is conceded by all the authorities that the standard by which to determine whether the person has been guilty of negligence is the conduct of the prudent, careful, diligent, or skillful man in the partitcular situation’.”

In *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, the court says:

“In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the traveling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. \* \* \* When a railroad is built, it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the exjenses of insurance upon those who use it  
\* \* \*

The plaintiff knew that he had two fragments of wire, too short to use, with something attached to the ends thereof. He had not been directed to use any such appliance, either by the foreman or by E. W. O'Hara, and there is no testimony in the record showing "that it was negligently given to him as a part of the tools and materials with which he was supplied for his said work," as alleged in the petition. If he was, in fact, trying to straighten the wire when he was injured it is plain that the wire had not been furnished him for the purpose alleged in his petition. E. W. O'Hara did not give him the wire either to use or straighten, and he was in no different position than if he had found it himself and undertaken to straighten it. There is nothing in the record to show that E. W. O'Hara knew, or should have known that the plaintiff intended to straighten the wire attached to the cap, or to make any use of it in connection with the work. The record positively shows to the contrary, for E. W. O'Hara testified that he was about to throw the cap away after he severed it from the wires and had no further use for it. Under the circumstances disclosed by the evidence, E. W. O'Hara could not have supposed that the plaintiff intended to make any use out of the cap, or the small fragment of wire attached thereto. He did not "furnish" him the wire to tie the cloth with and the plaintiff's own testimony so shows, as well as the testimony of E. W. O'Hara.

When the plaintiff undertook to handle a foreign article, he assumed the risks incident thereto. He was a mere volunteer when he asked for and received the cap and exploded it. It was the cap and not the wire that the plaintiff desired. If E. W. O'Hara had been in the act of throwing aside such a fragment of wire without a cap attached thereto, it is plain that the plaintiff would not have gone to the trouble to pick it up or straighten it, but would have understood from the fact that his uncle was discarding it that it was not fit for use. According to the plaintiff's own testimony, he stood idly by watching the

other men until he saw the cap. Until that time, he had not made any effort to search for wire or to help tie the cloths to the cable. The record discloses that the plaintiff was not acting within the course or scope of his employment when he was injured. The record fails to show any actionable negligence on the part of the defendant or his agents. The record does show that the plaintiff knew as much about the dangers incident to the work as any of the other men, and he, therefore, assumed the risk.

Assumption of risk is a complete defense to actions brought under the Federal Employers' Liability Act, except where the negligence of the carrier is in violation of some statute enacted for the safety of employees. *Jacobs v. Southern Railroad*, 241 U. S. 229; *Boldt v. Pa. R. Co.*, 245 U. S. 441.

E. W. O'Hara cannot be imputed with knowledge of the fact that the cap was dangerous without also imputing such knowledge to the plaintiff. The plaintiff was not injured from any act on the part of E. W. O'Hara, but was injured, according to his testimony, by accidentally striking the cap against the rail. If the suit had been brought against E. W. O'Hara on the ground that he was negligent under the facts disclosed by the record, we submit that no recovery could be sustained.

If we are right in these conclusions, the defendant was entitled to an instructed verdict.

The court instructed the jury (Instruction 4, R., p. 46):

"The burden of proof is upon the plaintiff to establish by a preponderance of evidence the following material allegations:

"1. That the defendant was negligent in some particular, as alleged in the plaintiff's petition.

"2. That the said negligence, if any you find, was the direct, immediate and proximate cause of the injury to the plaintiff.

"3. The amount of damage which the plaintiff has sustained, if any."

We submit that under the facts disclosed by the record, the court erred in giving this instruction, because by so doing all of the allegations of negligence set forth in the plaintiff's petition were submitted to the jury, but there was no proof to support them.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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EDSON RICH,  
C. A. MAGAW,

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# Supreme Court of the United States

October Term, 1923

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**No. 326**

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**JAMES C. DAVIS, AGENT OF THE PRESIDENT,  
UNDER SECTION 206 OF THE TRANSPORTA-  
TION ACT, 1920,**

*Petitioner,*

vs.

**JOHN O'HARA.**

---

**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEBRASKA**

---

**BRIEF FOR PETITIONER**

---

## **STATEMENT**

This case comes here on writ of certiorari to the Supreme Court of the State of Nebraska to review a final judgment rendered on the 21st day of February, 1923, which affirmed the judgment of the District Court of Douglas County, Nebraska, entered on the 5th day of June, 1922, upon the verdict of the jury, for \$46,840.11, all in excess of \$37,500.00 having been remitted (Rec., p. 203). A motion for a rehearing filed March 6, 1923, was overruled March 30, 1923 (Rec., p. 204).

The record shows:

On September 13, 1919, while the railroads were in the possession of the United States and operated by the Director General of Railroads, John O'Hara, the plaintiff,

was employed by him in the operation of the railroad of Union Pacific Railroad Company, and while so employed, suffered an injury, resulting in the loss of his eyesight, by exploding an electric blasting cap. He was a citizen and resident of Council Bluffs, Iowa, and the accident happened there. On February 9, 1920, he sued Walker D. Hines, Director General of Railroads, for his injury in the *District Court of Douglas County, Nebraska*, in violation of the plain provisions of General Order No. 18-A, which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. On February 12, 1920, summons was served on an operating official, operating the railroad upon which the plaintiff was employed, for the Director General (Rec., p. 5). On March 8, 1920, the Director General filed the following special appearance and motion to quash the summons:

"Comes now said defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein, and as grounds therefor alleges:

"That General Orders Nos. 50, 50-A, 18, 18-A and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits 'A', 'B', 'C', 'D' and 'E', respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that the pretended cause of action set forth in his petition did not arise in said county and state; and that this action is wrongfully brought therein." (For exhibits see Rec., pp. 6 to 11).

On March 13, 1920, the Court overruled this motion (Rec., p. 11). On March 17, 1920, the Director General filed his answer, in which he set up the general orders above mentioned and the want of jurisdiction by reason thereof, along with his other defenses (Rec., p. 11). On April 2, 1920, the plaintiff filed an amended petition and on April 12, 1920, the defendant filed his answer to the amended petition, in which he again challenged the jurisdiction of the Court on the grounds hereinbefore stated.

The case was tried twice. The first trial resulted in a directed verdict for the defendant. The plaintiff appealed to the Supreme Court of Nebraska and it reversed the case and ordered a new trial (Rec., pp. 21, 208 and 209). On the first appeal, the Nebraska Supreme Court dodged the jurisdictional question and refused to consider it, assigning as its reason therefor the failure of the Director General to file a cross-appeal from the judgment which, as above stated, was in his favor (Rec., p. 209). There was no final order entered against him on the first trial and he had nothing to appeal from, either directly or by cross-appeal. (The Nebraska statute only authorizes appeals from a final order, and it is not contended that an appeal should have been prosecuted from the order overruling the special appearance and motion to quash the summons, because this was not a final order).

The case was called for trial the second time May 31, 1922. The defendant objected to the empaneling of a jury and to the trial of the case on the jurisdictional ground hereinbefore stated, but the Court overruled the objection (Rec., pp. 38 and 39). He again challenged the jurisdiction of the court on the grounds above stated, at the close of the plaintiff's evidence and also at the close of all the evidence (Rec., pp. 85 and 190).

The second trial resulted in a verdict against the defendant for \$46,840.11. Judgment was entered thereon for that amount and the defendant appealed (Rec., p. 32).



On the second appeal, the Nebraska Supreme Court held that the District Court of Douglas County had jurisdiction because the Director General filed the above special appearance and motion to quash the summons. The Court states in its opinion, referring to the filing of the above motion, that "It must be conceded that unless the defendant has brought himself under the jurisdiction of the Court by a general appearance, the Court did not acquire jurisdiction" (Rec., p. 201). It is further stated in the opinion that by *filing the above motion and special appearance*, the "defendant called for a determination as to whether the Court had jurisdiction of the subject-matter of the action which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the Court in order that this might be done" (Rec., p. 201).

The defendant contends that the Court erred in holding that the District Court of Douglas County, Nebraska, had jurisdiction.

At the opening of the second trial, the plaintiff, for the first time, moved to substitute James C. Davis, Agent, as defendant in lieu of Walker D. Hines, Director General of Railroads, the original defendant. The defendant objected to such substitution on the ground that the Court was without jurisdiction, and on the further ground that the substitution was not made within the time prescribed by Section 1594, Vol. 3, U. S. Compiled Statutes, 1916, 30 Stat. L. 822, which limits the time within which such substitutions can be made to twelve months. The Court overruled the objection and the substitution was made (Rec., pp. 22 and 39, paragraphs 8 and 9).

Although this question was presented by the record, the Supreme Court of Nebraska ignored it. However, by

affirming the judgment, it in effect decided that the substitution was properly made.

The defendant contends that this was error.

At the close of the plaintiff's evidence, the defendant objected to being required to produce evidence for the reason that the evidence produced by the plaintiff was not sufficient to sustain a verdict or judgment in the plaintiff's favor under the issues joined. The Court overruled the objection (Rec., p. 85). Defendant renewed this objection at the close of all of the evidence (Rec., p. 190). He also requested the Court to instruct the jury to return a verdict for the defendant, which was refused (Rec., p. 31).

The plaintiff alleged in his petition that the following acts and omissions constituted negligence and relied upon them for recovery:

(a) That the defendant neglected to provide wires, repairs, tools and machinery for the proper operation of the gantry.

(b) That the defendant failed to furnish wire upon said machinery or its appurtenances.

(c) "That the foreman directed his subordinates to procure wire to complete said work."

(d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."

(e) That the wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work" (Rec., p. 13).

All of these allegations were submitted to the jury (Instruction 4, Rec., p. 25, post p. 7).

The defendant contends that the plaintiff's injury was not such as should reasonably have been foreseen as the

natural and probable consequence of any of the above acts or omissions relied upon by the plaintiff as negligence, in the light of attending circumstances. He also contends that the plaintiff's injury did not arise out of or in the course or scope of his employment; and contends that the plaintiff was not engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received the cap or when he exploded it and injured his eyes. The defendant further contends that he did not furnish the plaintiff the cap for his use in connection with the prosecution of the defendant's business, but that the plaintiff requested E. W. O'Hara, one of his fellow-servants, to give him the cap and that he gave it to him in compliance with such request for the purpose of satisfying the curiosity and personal ends of the plaintiff; and that when the plaintiff received and accepted the cap from his fellow-workman, he assumed the risk of exploding it and injuring his eyes. He also contends that the evidence fails to show that the plaintiff was engaged in interstate commerce when injured, within the meaning of the Federal Employers' Liability Act, upon which he relies for recovery.

The defendant further contends, for the foregoing reasons, that the Court should have held, as a matter of law, that the plaintiff was not entitled to recover and should have reversed the case with instructions to enter judgment for the defendant.

### **SPECIFICATION OF ERRORS**

#### **I.**

The Supreme Court of Nebraska erred in holding that the District Court of Douglas County had jurisdiction of this action.

#### **II.**

The Supreme Court of Nebraska erred in affirming the ruling of the District Court of Douglas County permitting

the plaintiff to substitute James C. Davis, Agent, as defendant, in lieu of Walker D. Hines, Director General of Railroads, the original defendant.

### III.

The Supreme Court of Nebraska erred in holding that the evidence was sufficient to sustain the verdict.

### IV.

The Supreme Court of Nebraska erred in holding that there was sufficient evidence to warrant the trial court in submitting either or all of the plaintiff's allegations of negligence to the jury.

### V.

The Supreme Court of Nebraska erred in holding that the plaintiff did not assume the risk.

### VI.

The Supreme Court of Nebraska erred in holding that the plaintiff was employed in interstate commerce when injured.

### VII.

The defendant requested the Court to give the following instruction to the jury:

"1. You are instructed to return a verdict for the defendant" (Rec., p. 31).

The Court refused the instruction and the Supreme Court of Nebraska erred in affirming this ruling.

### VIII.

The District Court instructed the jury (Instruction 4, p. 25) as follows:

"The burden of proof is upon the plaintiff to establish by a preponderance of the evidence the following material allegations:

"1. That the defendant was negligent in some particular, as alleged in the plaintiff's petition.

"2. That the said negligence, if any you find, was the direct, immediate and proximate cause of the injury to the plaintiff.

"3. The amount of damage which the plaintiff has sustained, if any.

"If you find that the plaintiff has failed to establish any one or all of the above propositions by a preponderance of the evidence your verdict will be for the defendant; but if you find that plaintiff has so established these propositions your verdict will be for plaintiff."

The Supreme Court, by affirming the judgment, approved this instruction and erred in so doing.

The foregoing specifications of error were set forth and relied upon by the petitioner in his petition for the writ of certiorari herein.

## **ARGUMENT**

### **I.**

**The Court erred in holding that the District Court of Douglas County, Nebraska, had jurisdiction of this action.**

This action was not brought in the venue prescribed by valid orders of the Director General. This fact did not appear on the face of the plaintiff's petition, but it is disclosed by the undisputed evidence (Rec., p. 46).

General Orders of the Director General Nos. 50 and 50-A provide that actions at law, based on claims for injury and growing out of Federal control,

"shall be brought against the Director General of Railroads, and not otherwise \* \* \*

"Subject to the provisions of General Orders Nos. 18, 18-A and 26, heretofore issued by the Director

General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company."

General Order No. 18, as amended by General Orders Nos. 18-A and 18-B, provides:

"that all suits against the Director General of Railroads, as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose \* \* \*"

✓ In *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, the court decided that General Order No. 50 is valid. On page 561 the court says:

"All doubt as to how suits should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name."

✓ In *Alabama, Etc. Ry. Co. v. Journey*, 257 U. S. 111, the court holds that General Order No. 18 is valid. In that case the Supreme Court of Mississippi held that General Order No. 18 exceeded the powers conferred on the President and by him on the Director General. Whether the court erred in so holding was the question presented. The court says:

"That it did err is clear from what we said in *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, decided since entry of the judgment under review. Section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, permitted enforcement of liabilities against carriers while under federal control except 'insofar as may be inconsistent \* \* \* with

✓✓ any order of the President.' It was within the powers of the Director General to prescribe the venue of suits; and the facts set forth in the order show both the occasion for it and that the venue prescribed was reasonable."

In *Davis v. Farmers Co-op. Equity Co.*, 43 Sup. Ct. Rep. 556 (decided May 21, 1923), the court says with respect to bringing suits in jurisdictions other than where the plaintiff resided or the cause of action arose:

"During federal control, absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18-A) which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as war."

The Supreme Court of Nebraska refused to give any effect to these orders of the Director General, because the defendant filed the motion to quash the summons hereinbefore referred to, as appears from its opinion in this case. Paragraph 2 of the syllabus reads:

"An action for damages against the Director General of Railroads under the Federal Employers' Liability Act is both local and transitory under General Order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer" (Rec., p. 196).



General Order No. 18 was made April 9, 1913, while General Order No. 50 was not made until October 28, 1918. When General Order No. 18 was made suits under Section 10 of the Federal Control Act (40 Stat. 451, chap. 25) were brought against the carrier and not against the Director General. Service was made by serving an agent of the carrier, out of the operation of which the cause of action arose in the same way as service was made on like agents of such railroads prior to federal control, and could be made at points far remote from the place where the plaintiffs resided or where the causes of action arose, and if the construction placed upon General Order No. 18 by the Supreme Court of Nebraska is correct, then suits could have been brought against any carrier under federal control at any place where it could be served with process, and General Order No. 18 did not accomplish its declared purpose, viz., prevent the bringing of suits "in jurisdictions far remote from the place where the plaintiffs resided or where the causes of action arose". If the construction placed on General Order No. 18 by the court is correct, its meaning was the same as if it had read, "It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose"; *provided that suits may be brought in any county or district where service of process can be made*, instead of the way it in fact read.

Such a provision would have made the order impotent, as it would have permitted suits to be brought and maintained in all respects the same as they could be brought before the order was issued. If the construction given the order by the state court is correct, the order does not say what it means nor mean what it says.

In the opinion the court says:

"After the petition was filed and summons served in Douglas County, the Director General, 'appearing spe-

cially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein.' As grounds therefor he alleged that plaintiff did not reside in Douglas County, Nebraska, at the time of the accrual of the cause of action, and that such cause of action did not arise in said county and state. No evidence was presented to prove these allegations, and the motion was properly overruled" (Rec., p. 198).

\* \* \* \* \*

"If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas County, the court would not have acquired jurisdiction over his person; but, if the defendant appears for any purpose except to object to the court's jurisdiction over his person, he thereby enters a general appearance in the action.

"Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done" (Rec., p. 201).

\* \* \* \* \*

(It is apparent that these statements are inconsistent, for if the motion was overruled because "no evidence was presented to prove" the allegations thereof, the Court was not called upon to determine anything except this fact. An examination of the motion will disclose that it does not call for a determination of the nature of the action. (See post., p. 17.)

The court further says:

"It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a

general appearance, the court did not acquire jurisdiction" (Rec., p. 201).

As above stated, it did not appear from the face of the petition that the suit was not brought in the venue prescribed by General Order No. 18-A, because it was not alleged therein either where the plaintiff resided or where his pretended cause of action arose. Before the defendant filed the motion to quash, he had been served with summons and there were no defects in the service so far as appeared from the face of the record, and if, as the court holds, the motion was equivalent to the service of summons, the defendant, by filing it, added nothing to what had already been done, and there was no way for him to invoke the benefit of the order without waiving it. The defendant had the right, under the Nebraska practice, to raise the question of venue in his answer and include it with a defense on the merits. In other words, the defendant might have filed his answer in the first instance, setting up therein the want of jurisdiction along with his other defenses, but he was not bound to do so as he also had the right, under the settled practice of the state, to do as he did do, viz., first file the motion to quash and when that was overruled, file his answer in the form above stated. This practice is settled by Sections 8610 and 8612 of the Revised Statutes of Nebraska for 1922 and by the decisions of the Supreme Court of that state. The decisions referred to are cited on page 20 of this brief and the above sections of the Code are set out at page 21.

The court states in its opinion that no evidence was presented to prove the allegations of the motion to quash and that it "was properly overruled". The record does not disclose upon what ground the motion was overruled, but assuming that it was overruled on the ground stated by the court, it should be remembered that courts take judicial notice of the orders of the Director General (*Davidson v. Payne*, 289 Fed. 69) and that the allegations with respect to the place of the plaintiff's residence and injury were ad-

mitted at the trial (Rec., p. 46), and the failure of the defendant to prove these facts, so peculiarly within the plaintiff's own knowledge, in support of the motion, did not give the court jurisdiction because, as above stated, the defendant, under the state practice, was not required to file the motion to quash but might have raised the objection to jurisdiction in the first instance in his answer. (If the motion was overruled on the ground stated by the court, it was a nullity and the rights of the parties remained the same as if it had never been filed and it did not, under the state practice, constitute a general appearance. Authorities in support of this statement are cited herein at page 17 and following pages of this brief.

In the case of *James C. Davis, Director General of Railroads, etc., Petitioner, v. George Wechsler*, decided by this court October 22, 1923 (not yet reported), the court decides the questions under discussion. That suit was commenced in the Circuit Court of Jackson County, Missouri. The cause of action arose in another county, and the plaintiff then and when the suit was brought resided in Illinois. The defendant set up a general denial and also that the court was without jurisdiction because of General Order No. 18-A. The court says:

"The plaintiff by replication relied upon the invalidity of the order, a point now decided against him \* \* \*. On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of Hines and according to the record the 'substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant'. It was not disputed and was stated by the court below that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits, but it was held by the Court of Appeals affirming a judgment for the plaintiff that the provision in General Order 18-A went only to the venue of the action and was waived by the ap-

pearance of Payne. A similar effect was attributed to the appearance of the present petitioner Davis in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

"We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co. v. Levee*, decided this day.

"The Transportation Act, 1920, Feb. 28, 1920, c. 91, Sec. 206 (a) and (d); 41 Stat. 456, 461, 462, in no way invalidates a defense good when it was passed."

In *Traux v. Corrigan*, 257 U. S. 312, the court holds:

"Where the issue is whether a state statute, in its application to facts specifically alleged, and admitted

by demurrer, violates the plaintiff's rights under the Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect; it is not bound by the state court's conclusion in this regard, nor by that court's declaration that the statute is merely a rule of evidence."

In *Ward v. Love County*, 253 U. S. 17, the court holds:

"The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The question as to whether or not the District Court of Douglas County had jurisdiction does not depend upon whether or not the special appearance and motion to quash constituted a general appearance under the rules of local practice; but depends upon the validity of the Orders. The District Court of Douglas County was without jurisdiction, even though the defendant did enter a general appearance, which we deny, by filing the motion to quash the summons. Neither does this question hinge upon nice distinctions as to whether or not the cause of action is transitory, but it seems to us plain that the very purpose of the order was to make such causes of action local. The orders superseded all other laws both federal and state; they were specific in their terms, and while in effect were the supreme law of the land upon the subjects which they covered. They were of general application and did not vest any discretion in the attorneys for the Director General, or in any of his other administrative officers, or in the courts, and no attorney or officer was vested with the power to waive the orders or any of the provisions thereof. If the attorneys had power to waive one provision of an order, they had the power to waive all, and thereby had the power to set aside or nullify every order issued by the Director General. If he had intended to vest such discretion in them and to clothe them with such power, it is manifest that he would have done so by express terms.

In *Stanley v. Schwalby*, 162 U. S. 255, the court holds:

"Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, is authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

See also—

*Smith v. Reeves*, 178 U. S. 436,  
*Southern Bridge Co. v. U. S. Shipping Board*, 266  
Fed. 747, 751.

*The motion to quash the summons filed in the present case did not constitute a general appearance.*

In *Bankers Life Insurance Co. v. Robbins*, 59 Neb. 170, paragraph 2 of the syllabus reads:

"Whether an appearance is general or special does not depend upon the form of the pleading, but upon its substance."

In *South Omaha National Bank v. Farmers & Merchants National Bank*, 45 Neb. 29, paragraph 1 of the syllabus reads:

"An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form."

This principle is adhered to in *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, on rehearing, 71 Neb. 273, which is cited approvingly by the court in its opinion in the present case. This was a suit brought in Jefferson county, Nebraska, on a benefit certificate issued by a mutual benefit association that had



appointed the Auditor of State its attorney-in-fact upon whom process might be served. An alias summons was served by the sheriff of Jefferson county on the attorney-in-fact. The defendant moved to quash this service, alleging in his motion "that the court was without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," whereupon the reasons are set forth, ten in number. The court says (p. 273):

"We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. *Our duty in this matter depends upon whether or not, under the 'reasons assigned,'* there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court \* \* \*

"With these considerations in view we turn to the 'reasons assigned'."

The court then quotes the fifth and seventh reasons assigned in the motion and says (p. 275):

"The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject-matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject-matter, and that he has done so both by his averments and by the evidence. And again, the seventh assignment, if it means anything, is a plea of *res judicata* of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be

used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization."

In 4 C. J. 1317 it is said:

"Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character, although it may forestall the ordinary presumption that an appearance is general. Where a special appearance is evidently intended, the court cannot enlarge it and make it general, for the extent to which the defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

An examination of the defendant's motion (Rec., p. 6), in the light of the foregoing authorities, shows that he did not enter a general appearance by filing it. The motion simply asked the court to quash the summons and prayed for no other relief. The "*reasons assigned*" in the motion for quashing the summons were the orders of the Director General, hereinbefore referred to.

If the motion did constitute a general appearance, which we deny, and if by entering a general appearance the Director General waived the benefit of his Orders, which we also deny, then it must follow that he could not invoke their benefit without waiving them and he had as well not made them. They were mere "scraps of paper" unless the courts gave effect to them by enforcing them when called upon to do so.

The defendant challenged the jurisdiction of the court at the first opportunity on the ground that the suit was not

brought in the venue prescribed by General Order No. 18-B, and again challenged it in his answer in accordance with the well settled practice, as appears from the following decisions of the Supreme Court of Nebraska:

*Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801,  
*Stelling v. Peddicord*, 78 Neb. 779,  
*Hurlburt v. Palmer*, 39 Neb. 158,  
*Kyd v. Exchange Bank*, 56 Neb. 557,  
*Templin v. Kimsey*, 74 Neb. 614.

As stated by Judge Letton in his dissenting opinion in the present case (Rec., p. 202), "The court overrules these cases without mentioning them".

In *Baker v. Union Stock Yards National Bank*, cited above, it is said:

"A succession of well-considered cases has settled the law in this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. *Omaha Loan & Trust Co. Savings Bank v. Knight*, 50 Neb. 342; *Ley v. Pilger*, 59 Neb. 561. But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have. *Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n. v. Peterson*, 41 Neb. 897; *Herbert v. Wortendyke*, 49 Neb. 182; *Barry v. Wachosky*, 57 Neb. 534, 535; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728. While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in

cases of this character. No special appearance or preliminary objections were made in *Hurlburt v. Palmer*, *supra*, or *Herbert v. Wortendyke*, *supra*, and the provisions of sections 94 and 96 of the Code of Civil Procedure, taken together, would seem to make it clear that they were not required. See also *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

(The sections of the Code referred to above, being Sections 8610 and 8612, Compiled Statutes of 1922, read:

"Sec. 8610. The defendant may demur to the petition only when it appears on its face, either:

"First. That the court has no jurisdiction of the person of the defendant or the subject of the action;

"Second. That the plaintiff has not legal capacity to sue;

"Third. That there is another action pending between the same parties for the same cause;

"Fourth. That there is a defect of parties, plaintiff or defendant;

"Fifth. That several causes of action are improperly joined;

"Sixth. That the petition does not state facts sufficient to constitute a cause of action."

Section 8612 reads:

"When any of the defects enumerated in Section 107 (Section 8610) do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.")

In its opinion the Supreme Court of Nebraska mentions the fact that at the first trial a motion was made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, and says:

"But no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

We fail to see how this tends to show that the District Court of Douglas County had jurisdiction of this case. With respect to the motion to dismiss referred to by the court, it should be remembered that the District Court sustained it and entered judgment for the defendant, and there was no reason for him to complain further that the court had no jurisdiction. The statement that no objection was made during the trial to the jurisdiction of the court is misleading and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence. In *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb. 897, it expressly appears from the opinion that after judgment against him on the merits, defendant Busch filed a motion for a new trial, but his objection to jurisdiction was, nevertheless, sustained by the Supreme Court upon appeal. Clearly, if the defendant has the right to assert a defense upon the merits together with objections to jurisdiction not appearing upon the record, he must have the right to avail himself of that defense. To ask and obtain the judgment of a trial court that the plaintiff had failed to establish a right to recover upon the merits could confer no jurisdiction upon that court when the undisputed evidence conclusively showed a lack of such jurisdiction, if no such effect is given to the filing in the trial court of a

motion asking for a new trial of the entire case. We do not understand what bearing the fact that no motion for a rehearing was filed has, unless the court wishes to give the inference that the jurisdictional question was not directed to its attention on the first appeal. In order that there may be no mistake concerning this, we direct attention to the following from the opinion of the court on the first appeal (Rec., p. 213):

"Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now."

The rule of the court has no application whatever to a case of this nature, but only applies to cases where a final order is entered against the appellee and he desires to have that ruling reviewed.<sup>1</sup> In the present case there was no final order entered against the appellee on the first trial, but the judgment was in his favor and he had nothing to appeal from, either directly or by cross-appeal.

The inference made by the above quotation from the opinion on the second appeal that the jurisdictional question

1.—The rule referred to reads: **On cross-appeal.**—Co-parties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court, within four months after the date of the judgment appealed from or the overruling of the motion for a new trial, a praecipe which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees.

was settled by the first appeal is not substantiated by the record.

It is settled law that the case could not be brought to this court from the decision in the first appeal, reversing the case and remanding it for a new trial.

"This court cannot be called upon to review the action of the state court by piecemeal, and even if the judgment does finally dispose of some elements of the controversy, unless it is final on its face as to the entire controversy this court will not review it."

*Louisiana Navigation Co. v. Oyster Commission*,  
226 U. S. 99,  
*Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207,  
*Bruce v. Tobin*, 245 U. S. 18.

Apparently the Supreme Court of Nebraska merely *suspended* the rules of practice, settled by its former decisions, and did not overrule them. Whatever may be said as to the character of the defendant's motion, the opinion seems to be "special" and for the purpose of this case only, and not general". Neither *Baker v. Union Stock Yards National Bank*, 63 Neb. 801, nor any of the many kindred cases, are even mentioned.

Nor is this all. The court below in determining whether an objection to jurisdiction over the subject matter of the action was presented by the defendant's special appearance, ignored the *substance* of the objection; whereas, in *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, 273, it plainly held that the court's duty in determining this question was to look to the "reasons assigned" rather than to the formal parts of the motion (*Supra*, p. 18).

In the opinion in the case at bar, the Supreme Court of Nebraska said (Rec., p. 198):



"After the petition was filed and summons served in Douglas County, the Director General, 'appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject matter of this action, moves the court to quash the summons herein'. As grounds therefor, he alleged that *plaintiff did not reside in Douglas County, Nebraska, at the time of the accrual of the cause of action, and that such cause of action did not arise in said county and state.*" \* \* \* "The orders of the Director General are concerned with, and govern only the venue of the action" (Rec., p. 199). \* \* \* "The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived" (Rec., p. 200). \* \* \* "The order of the Director General fixing the venue did not affect the subject matter of the action" (Rec., p. 201).

In *Perrine v. Knights Templar's, supra*, as appears from the opinion (page 273), the defendant's objection stated:

"Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the *subject matter* or of the person of the defendant for the following reasons:

"\* \* \* 5. That the defendant is a foreign co-operative and mutual insurance company, doing business in the State of Nebraska only by virtue of a license issued to it by said state as such corporation, and *neither the alleged cause of action nor any part thereof arose in Jefferson County or in the state of Nebraska, and plaintiff is not now, and never has been, a resident or citizen of the state of Nebraska.*"

In the opinion, page 275, it is said:

"The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson County. This raises the legal question whether or not the alleged cause of action set forth in the petition was

local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and *is a jurisdictional question, not of the person, but of the subject matter of the action.*"

It thus appears that the almost identical language which in the *Perrine* case the Supreme Court of Nebraska held appropriately questioned the court's jurisdiction *over the subject matter of the action*, was held in the case at bar, to raise only a question of venue, which "*did not affect the subject matter*".

Again, in the face of the fact that the *only* "reason assigned" in the motion filed by the defendant in the instant case was that the plaintiff's cause of action did not arise in Douglas County, Nebraska, and that the plaintiff did not reside in said county, the Supreme Court of Nebraska held that this objection, concededly valid and sufficient, was waived because in the formal part of the motion the words "*subject matter*" appear.

There is thus presented by the record herein a complete reversal in every particular of the decision in *Perrine v. Knights Templar's, supra*, which, instead of being overruled, is cited in the opinion in support of the conclusions here complained of.

The Supreme Court of Nebraska thus evaded the plain assertion of a federal right by innovations in local practice applicable alone to the case at bar and flatly at variance with its own previously well-settled rules.

The fact is the court arbitrarily refused to give effect to the war order in question and its decision amounts to holding the order void.

## II.

The Court erred in affirming the ruling of the District Court of Douglas County permitting the plaintiff to substitute James C. Davis, Agent, as defendant, in lieu of Walker D. Hines, Director General of Railroads, the original defendant.

When the case was commenced, January 9, 1920, Walker D. Hines was Director General of Railroads. March 11, 1920, he was designated as Agent in accordance with subdivision (a) of Section 206 of the Transportation Act. May 14, 1920, Walker D. Hines, as such Agent was succeeded by John Barton Payne, who in turn was succeeded March 6, 1921, by James C. Davis. No application for substitution was made until the case was called for trial the second time, which was May 31, 1922. The defendant objected to substitution on the ground that the court had no jurisdiction of the action, and on the further ground that Section 1594, Vol. 3, U. S. Compiled Statutes 1916, 30 Stat. L. 822 (entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), limited the time within which such substitutions could be made to 12 months.

We have not overlooked the Winslow Act of March 3, 1923, which amends Section 206 of the Transportation Act, 1920, by providing that actions *properly commenced* and pending at the time the amendment becomes effective "shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads, or the Agent designated under subdivision (a), but may (despite the provisions of the act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899) be prosecuted to final judgment \* \* \* substituting at any time before satisfaction of such final judgment \* \* \* the Agent designated by the President then in office \* \* \*".

The defendant contends that the limitation of 12 months prescribed by the act of February 8, 1899, applies to this

case because it was not *properly commenced*, as it was commenced contrary to the provisions of General Order No. 18-B. Since it was not properly commenced, and therefore was not properly pending when the Winslow Bill passed, substitution was not authorized by that act.

*Payne v. Industrial Board of Illinois*, 42 Sup. Ct. 462,

*LeCrone v. McAdoo*, 253 U. S. 217,

*Payne v. Slatinka*, — U. S. — (decided January 8, 1923).

*Davidson v. Payne*, 289 Fed. 69.

### III.

The Court erred in holding that the evidence was sufficient to sustain the verdict.

The verdict is not supported by the evidence because it fails to show, either that the plaintiff's injury was due to actionable negligence, or that he was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when injured.

The plaintiff claims that the Director General was engaged in interstate commerce; that he was employed by him in such commerce when injured; that his injuries resulted from the negligence of the employes of the Director General, and that, therefore, he is entitled to recover damages under the Federal Employers' Act, as appears from his amended petition, in which it is alleged in substance:

That the plaintiff was employed by the Director General in the operation of a gantry, which was maintained and used by the Director General for transferring interstate shipments from one car to another; that on September 13, 1919, the plaintiff and other employes were making a sling out of a wire cable, to be used in transferring a car of poles, and that they were engaged in wrapping the cable with cloth to protect the employes from injury by the jagged

ends of the cable; that they needed wire with which to tie the cloth to the cable, but that the Director General had neglected to provide it, and that "the foreman directed his subordinates to procure wire to complete said work"; that thereupon one of the employes sought and found a piece of wire in an empty coal car and "brought it to said foreman, who accepted same and directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition"; that the employes

"undertook to use said wire for said purposes, which wire had been retained, and while the foreman and one of the defendant's employes aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purpose alleged.

"Plaintiff alleges that there was a small, metal bulb or cylinder on the end of said wire, and while engaged in preparing said wire the said bulb exploded.

"Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power, but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

"Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both his eyes will have to be removed" (Rec., p. 2).

In his answer to the amended petition the Director General, in addition to the jurisdictional defense hereinbefore referred to, admitted the formal allegations of the amended petition; admitted that E. W. O'Hara found a piece of wire in an empty coal car; that the foreman did not examine it and did not see that there was a cap attached thereto; denied generally the other allegations of the plaintiff's petition, and alleged that:

"E. W. O'Hara cut the cap off of the wire" and "that after so doing the said E. W. O'Hara was in the act of throwing said cap away, when the said John O'Hara requested the said E. W. O'Hara to give him the said cap, and defendant alleges that thereupon the said E. W. O'Hara gave the said cap that had been cut off of said wire to the said John O'Hara, and that a short time thereafter he exploded the same and injured his eyes, but defendant expressly denies that the said injuries arose out of or in the course or scope of the employment of the said John O'Hara, and denies that he was engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received said cap or when he exploded it and injured his eyes.

"Defendant further alleges that the said E. W. O'Hara was not acting within the scope or course of his employment when he gave the said cap to the said John O'Hara, and that he did not give the cap to the said John O'Hara for his use in connection with the prosecution of the defendant's business in any way, but gave it to the said John O'Hara upon his request, as aforesaid, for the purpose of satisfying the curiosity and personal ends of the said John O'Hara.

"Defendant further alleges that neither he nor any of his agents, servants or employes had any knowledge of the existence of the said cap until its discovery in the empty coal car by the said E. W. O'Hara, and that neither this defendant nor any of his agents, servants or employes have any knowledge as to where the said cap came from or as to how or when the same got into said car."

He further alleged in the answer that the plaintiff's injuries were due solely to his own fault and negligence, and not to any negligence on the part of the defendant or his agents; and "that when the plaintiff received and accepted said cap from the said E. W. O'Hara, the plaintiff assumed the risk of exploding it, and injuring his eyes in the manner in which he did injure them".

The Iowa Workmen's Compensation Act was also pleaded in the answer (Rec., p. 16).

Under the issues so joined the defendant is not liable, unless the evidence is sufficient to sustain a verdict under the Federal Act (See Iowa Workmen's Compensation Law, which supersedes the common law with respect to liability for personal injuries, Rec., p. 142).

**There was no proof of negligence.**

Before discussing the evidence we will review the decisions of the Supreme Court of Nebraska rendered on the first and second appeals.

As stated, the first trial resulted in an instructed verdict for the defendant, and the first appeal was an appeal by plaintiff from the judgment in favor of the defendant entered on this verdict. On this appeal the court decided: "The provisions of the Federal Employers' Liability Act create a liability against the employer for the negligence of a fellow employe of an injured workman," and that it was "error for the trial court to instruct the jury to return a verdict in favor of defendant" (Rec., p. 209).

There was no controversy with respect to the defendant's liability for the negligence of a fellow servant. That he is liable for such negligence, if any, is settled by the terms of the Federal Act. The question was whether the evidence proved the charge that a fellow servant was negligent, or any of the other charges relied upon in the petition.

The court says in its opinion on the first appeal (Rec., p. 212): "In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of



the gantry \* \* \*” and the court holds that the question as to whether or not E. W. O'Hara was guilty of actionable negligence, when he let the plaintiff have the cap, was for the jury and reversed the case on this ground.

At the second trial the court by its instructions (see Instructions 1, 2, 3 and 4, Rec., p. 23) submitted all of the alleged acts of negligence set forth in the plaintiff's petition to the jury.

On the second appeal the court decided, among other things:

“There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to” (Rec., p. 196).

In its opinion on the second appeal, the court says (Rec., p. 197):

“The principal grounds relied upon for reversal are: that the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.

“Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the

Federal Employers' Liability Act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the negligence of the master. The argument in this connection that O'Hara did not give the wire to the plaintiff to promote the defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent \* \* \*."

The court makes no further mention or comment in its opinion with respect to the defendant's contentions.

### STATEMENT OF THE EVIDENCE

On the day of the accident the plaintiff and the men with whom he was working were employed at a gantry, which is a large crane used to transfer heavy shipments from one car to another. The record shows that some of the shipments transferred were moving in interstate commerce, but does not show that the gantry was used exclusively to transfer shipments moving in such commerce.

They finished transferring a carload of steel during the forenoon and had nothing to do until another car was set at the gantry by the switch crew. While they were waiting for this, the foreman decided to make a sling out of a discarded wire cable.

The plaintiff testified (R., p. 41, Q. 33): "The foreman said to get the cable out of the shanty that we had put in there, and to cut off a piece that would be large enough to make a cable sling." This was a general order to the gang. After the cable was cut off, the ends were clamped together with U-bolts (R., p. 42, Q. 50). After this was done "Mr. Turner said that where the coupling (cable) was cut off, the strands of the wire were all loose, and he said it would be better to put a cloth or something around the ends, so that nobody would get their hands hurt when they were

handling the sling, and he said to get cloth to wrap around this, and we would have to have some wire to fasten it down with" (R., p. 42, Q. 59). There was no suitable wire in the tool house and this fact was reported to Foreman Turner and "He said to see if we could find some." This order was given "to the gang" (R., p. 42, Qs. 60 to 65). "My uncle (E. W. O'Hara) found some wire in the empty coal car. I did not know where he got it from at the time." He brought the wire up to "where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful or there would not be enough of it to do the work with" (Rec., p. 43, Q. 68). (Exhibit 3, Rec., p. 65, is the same kind of cap and wire). "My uncle cut off a piece to use to wrap around the cloth, and the other was handed to me. The piece that had the cylinder on it, and the wire that had been crumpled up when he tried to take it off, four or five inches of wire, besides what was crumpled up around in the end of the cylinder. I thought that if they would not have enough of the wire that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on, and I had the cylinder part in my left hand and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." It exploded and blew my eyes out (R., p. 43, Qs. 71 to 76). I did not know what the cap on the end of the wire was. I was going to use the wire to help fasten the cloth on so it would stay on better (R., p. 44, Qs. 82 to 85). The first time I saw the cylinder or cap was when my uncle gave me the wire and I started to straighten it. My uncle did not say anything to me and I did not say anything to him when I took the cap. No one said anything to me at that time. Mr. Turner was a few feet away working on the clamps. I did not call his atten-

tion to the cap and " I do not suppose he knew I had it" (R., p. 47, Q. 145). No explosives or caps were used in the work and none were kept on the premises.

Francis W. O'Hara, plaintiff's witness, testified that the foreman "told some one to get some wire and cloth" and they got some cloth, but there was no wire (R., p. 56, Q. 281). When Foreman Turner asked some one to get the wire "my father (E. W. O'Hara) told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that" (R., p. 56, Q. 287). "He held it up to the foreman and asked him if it was all right" and the foreman "said it was all right, but there would not be enough of it. My daddy said it will have to be because that is all there is" (R., p. 57, Qs. 297 to 299).

Edward W. O'Hara, plaintiff's witness, testified that during the forenoon he noticed a piece of wire in the coal car from which he transferred the sheet iron. "I did not pay any attention to it" (R., p. 62, Q. 395). There was a car of telegraph poles that we expected to transfer and "the foreman said that they were to fix it right after dinner \* \* \* He said that we would have to make a sling out of a piece of cable, as the rope was not heavy enough to handle them" (R., p. 63, Q. 403). There was a piece of cable in the shanty. "Some of them got this cable out and cut off about what we wanted of it \* \* \*. I was at something else. I did not help take it out or cut it off \* \* \*. It was clamped together with U-bolts. I suggested that we get a cloth and tie it around the end of the cables on account of where they were cut they were so rough that they would tear our hands" (R., p. 63, Qs. 406 to 412). The foreman said "we would have to cover it up or we would cut our hands on it and we should tie a cloth on it." This direction was not given to any one in particular. "Well, they got the cloth and had to have something to

tie it on with. I said we would have to tie it on with some wire; string would not be heavy enough. We did not have any. So I happened to think of the piece I had seen in this car that I had transferred the sheet iron from. I went in there and got it, and when I got it it had this cylinder on it. I did not know there was a cylinder on it until after I took it up. There was two strands of wire, separate strands of wire coming out of the ends of the cylinder. I tried to twist it off. It did not go and I picked up a hammer that was laying there, and I laid it across the rail and I cut it off. I took one piece with the cylinder and hung it up in the shanty, in the tool house, and the other piece I took down and I and Mr. Berg wrapped it around the cable \* \* \* " (R., p. 64, Q. 418). When I got the wire, "I crawled out of the car with it and Turner was just coming down out of the crane \* \* \* and I was just a little ahead of him, and I held it up, I says, I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is" (R., p. 64, Q. 420) \* \* \* I would not say that Mr. Turner saw the cap. "It would have been very easy to overlook. It was not very large" (R., p. 75, Q. 595). Exhibit 3 is similar to the cap and wire that I had. After Mr. Berg and I had tied one cloth on, I went and got the other piece and cut it off the cap, leaving about four or five inches attached to the cap. "I started down where Turner was working, where the cable was, and I had the wire in one hand and the cap by the end \* \* \* John was there and I gave it to him. He reached over and took it (R., pp. 65 and 66, Qs. 433 to 459). I did not know what the cap was and did not make any effort to find out. I said it looked like a fire cracker, but I do not know whether John heard that or not (R., p. 66, Q. 456). After John took the cap, I went right on down to the end of the crane where Turner was working. I worked there a minute or a minute and a half and heard the explosion and heard John scream. I was not over five feet away" (R., p. 68, Q. 478).

On cross examination E. W. O'Hara testified: Immediately before the explosion "I was standing down there waiting for them to get the bolts tight and had the wire in my hand. John had the cap at that time" (R., p. 72, Q. 547). After I got the wire out of the coal car "I had the cap in the left hand and I tried to pull the wire out. I jerked on it two or three times and it did not come, and I tried to twist it off. It was not heavy. I thought it would twist, but it did not twist. It was too tough. I laid it across the rail like that and hit it with the hammer and cut it off, and I took one part of it, the part that had the cylinder on and I hung it up in our shanty because I was going to use it later, and took the piece that was in my hand and wrapped it around the cable." That tied on one cloth (R., p. 71, Qs. 539 and 540). I later got this strand and cut the cap off to tie the other cloth on (R., p. 72, Q. 551). He testified:

557 Q. What were you going to do with the cap when you cut it off, did you have any use for that?

A. No. I hadn't any use for it (R., p. 73).

564 Q. What were you in the act of doing with the cap after you cut it off and before John took it?

A. I had it in my hand.

565 Q. For what purpose did you have it in your hand?

A. Why, I just had that cut off, of course, is the reason I had it in my hand.

567 Q. What did you do with it?

A. I gave it to John.

568 Q. How did you happen to take it back to John?

A. I don't know. He reached over and took it, I guess. At least I gave it to him.

569 Q. Did you give it to him or did he reach over and take it?

A. Well, kind of both, I guess. When he reached I handed it to him.

570 Q. Did he say anything to you?

A. He wanted to know what it was. He said, what is

that? I says, I don't know, it looks like a fire cracker.

571 Q. Is that all that was said?

A. That is all.

At that time John walked over and sat down on the rail and I went on with my work (R., p. 74, Q. 576). It was possibly two minutes after that that I heard the explosion. I did not know what the cap was at the time I gave it to him. I had never seen one before (R., p. 74, Qs. 577 to 581).

581 Q. You had all of the wire that you needed to tie that other cloth on at that time, did you not?

A. I do not know whether I had all I needed. I had about all there was (p. 74).

584 Q. You had cut off all there was. That is all you had, was it not?

A. I cut off the most of it anyhow.

604 Q. What was your purpose in letting John take the cap from you?

A. I had no purpose. I would give it to anybody that would ask for it (p. 76).

The plaintiff, John O'Hara, and his uncle, E. W. O'Hara, both testified that the plaintiff resided in Council Bluffs, Iowa, at the time of the accident and that the accident occurred in that place (Qs. 121 to 130, p. 46).

John Turner, a witness for the defendant, testified that they used chains at the gantry to transfer sheet iron or steel. That they had chains on the day of the accident; that they had two ropes, an inch and a half rope and a two-inch rope. That this was the ordinary equipment of the gantry (R., p. 86, Qs. 729 to 740). After we finished unloading the steel we did not have any particular duties to perform, except to wait until another car was set. On the day of the accident we made a cable sling after dinner; that is all we did after we finished unloading a car of steel. We made the sling "for handling lumber and poles and anything in that



line of wood so in case we had a load of wood we would use the cable, and otherwise if it was steel or iron we used a chain." I had been working there since January, 1919, and there was no cable sling there during that time (R., p. 88, Qs. 751 to 757). "We had a piece of cable in the tool house and I told some of the boys to bring that cable out and cut about 30 or 35 feet off of it, and to make a cable we would have to have some cable clamps to make a sling, and it would be much easier to use than a chain in going around double loads of lumber and telephone poles and anything of that kind in that line, and so they brought the cable out \* \* \* and cut it and put the clamps on and fastened the hoist on and put it around the end of the coal car. We had it fastened to the hook at the top of the crane so you could tighten the nuts on the clamps. Ed. O'Hara was standing by my left side, I believe it was. I had the monkey wrench and was tightening the clamps on the cable when I heard the explosion \* \* \*" (R., p. 88, Q. 759). I did not know there were any explosives on the premises and had not seen this cap and did not know that any one had it. If E. W. O'Hara held the wire up for me to see, I did not see it (R., p. 89, Q. 761).

801 Q. Do you recall what directions, if any, you gave in regard to tying cloth on this cable?

A. Well, I asked some of the boys if there was any wire, to get some wire, that there was some of that little rope or twine in the car (shanty), that it was all right, and some said the wire was too big. I saw there was an old broom in there, and you can tear the old broom up and use the broom wire, either that or some of this binding twine. That is as far as I know. I do not know where they got the wire, in the shanty or where it came from.

Miss Cherie M. Gray, a stenographer, was called to St. Joseph's Hospital and took a statement from the plaintiff. It consisted of questions asked by Mr. VanNoy and answers given by the plaintiff (Qs. 953 to 963, p. 100). She testified:

1018 Q. I will ask you to refer to the transcript which you have identified before and I will ask you if on that occasion John O'Hara was asked this question by Mr. VanNoy: "Q. How did you happen to get injured, John?" and if in reply to that question John O'Hara did not state: "A. We were fixing that cable and looking for a piece of wire to wire some canvass on to the cable so we would not cut our hands on it and my uncle found this bit of wire and he cut the wire off and it had a little brass tube on the end of it. I had the brass tube and I wasn't doing anything so I tapped that little tube—it had yellow stuff in it, and I was knocking that powder out, or whatever it was, I don't know—I was tapping that thing and I turned it around and hit it on the other end and the thing went off." Was that question asked John O'Hara at that time and did he make that answer, Miss Gray?

A. Yes, I will say so (Q. 1022, p. 106).

1023 Q. I will ask you further by refreshing your recollection from this transcript whether John O'Hara was then asked by Mr. VanNoy this question, following the one which I have already read: "Q. It exploded?" and whether John O'Hara made this answer: "A. Yes, I was tapping the open end. One end was closed, and I was trying to get the powder out of it, and when I hit the closed end it went off." Was that question asked and did Mr. John O'Hara, the plaintiff, make that answer, Miss Gray, at that time?

A. Yes, I will say yes to that.

1025 Q. I will ask you if on that same occasion John O'Hara was asked by Mr. VanNoy this question: "Q. And it was full of powder?" and whether John O'Hara, the plaintiff, in answer to that question made this reply: "A. Some kind of yellow stuff. I don't know whether it was powder or not"?

A. That question was asked and answered that way.

1027 Q. I will ask you if on the same occasion John O'Hara, the plaintiff, was asked the following question by Mr. VanNoy: "Q. You say your uncle, E. W.

O'Hara, gave you this little copper tube?" and if in reply John O'Hara made this answer: "A. He cut the wire off and I took it, about the same as giving it to me. I went up after he cut it off and he held it in his hand." Was that question asked and that answer given by John O'Hara on that occasion, Miss Gray?

A. Yes, sir.

The plaintiff denied that he gave the above answers (Q. 155, p. 48).

O. B. Monahan, employed by the Dupont Powder Company, Wilmington, Delaware; A. E. Anderson, technical representative for the Dupont Powder Company; C. P. Beistle, chief chemist for the Bureau of Explosives, and who for six years was assistant chemist for the Bureau of Ordnance of the War Department, and H. A. Campbell, an inspector for the Bureau of Explosives, all qualified as experts and testified on behalf of the defendant. Each of these witnesses testified that he had had experience in handling explosives of various kinds and that he had handled and was familiar with the proper method of handling electric blasting caps such as the one the plaintiff exploded.

Mr. Beistle testified that (R., p. 134, Q. 1401):

"The regular blasting cap consists of a copper tube about a quarter of an inch in diameter and the usual size, the ordinary size is about an inch and a half long, and in the bottom of the copper tube there is about 15 grains of fulminate of mercury, and about 9/10ths of this is compressed to a solid mass in the bottom of the tube, and there is a small amount of loose fulminate placed on top of that, or it may be gun cotton in the loose form, and over this small amount of loose fulminate or gun cotton there is a small, what we call a bridge, it is a very fine platinum wire connecting the ends of the two wires that are run down into the tube through the open end, and these two wires pass through a composition plug, something like asphaltum, and this asphal-

tum plug sets on the loose fulminate, and through it pass these two wires in such a manner that they will not touch, and on top of this asphaltum plug there is a sulphur plug poured in on the material while it is hot so that as it cools it sets and seals the top of the cap so no moisture can penetrate, and these wires are inserted in this solid form of composition so that they are not easily taken out in rough handling."

Mr. C. P. Beistle made tests of the blasting caps "to see how much they would stand in rough handling." He made a device, a picture of which is shown at page 136, Exhibit 14, and with this appliance allowed a weight to strike the cap so as to indent the same at the loaded end, as shown by Exhibits 15, 17 and 18, at page 136 of the record. Mr. Beistle testified that he also "took some of these electric blasting caps that were packed ready for transportation, and we took a box up on top of a cliff and just threw the whole box over, and it fell down about forty feet and struck the rocks on the bottom and broke the wooden box all to pieces, and some of the paste-board cartons, or inside boxes were broken open, and many of the caps came out, but none were exploded" (R., p. 137, Q. 1419).

All of the expert witnesses testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question. The experts also testified that the electric blasting caps such as the plaintiff was injured with are used commercially; that when the caps are furnished to the employee who is to use them the wires attached thereto are folded; that the men unfold the wires by "whipping" them out, and that in doing so they frequently strike hard substances and are subjected to blows similar to the blow which the plaintiff testified he accidentally gave the cap with which he was injured. That in all of their experience, ranging over many years, they never heard of a cap exploding from such a blow. They further testified that the electric blasting cap could not be exploded in ordinary handling or in

the manner plaintiff claimed; that while they would explode from concussion, it required a blow sufficient to indent the shell to explode the cap, and that exposure to sun, rain and weather generally will not affect their explosive character.

It was the duty of the Court to direct a verdict for the defendant, since the evidence did not support a finding for the plaintiff.

*Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556,

*Hards v. Platte Valley Imp. Co.*, 46 Neb. 709,

*Knapp v. Jones*, 50 Neb. 490,

*Harrison v. Stipes*, 34 Neb. 431,

*Anders v. Life Ins. Co.*, 62 Neb. 585,

*Burke v. First National Bank of Pender*, 61 Neb. 20,

*Shiverick v. Gunning*, 59 Neb. 73.

In *Brady v. C., St. P., M. & O. R. Co.*, 59 Neb. 233, it is held:

"Where there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question of negligence is for the court."

*C., B. & Q. R. Co. v. Landauer*, 36 Neb. 643,

*Knapp v. Jones*, 50 Neb. 490,

*Schiverick v. Gunning*, 58 Neb. 29,

*Empire State Cattle Co. v. Railway Co.*, 210 U. S. 1, 10.

In *Western Mattress Co. v. Ostergaard*, 71 Neb. 575, the court says:

"When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury."

On page 577 the court says:

"While negligence is alleged in the petition because of this failure, yet the testimony wholly fails to support this allegation of the petition, and, being wholly unsupported by competent evidence, it should not have been submitted to the consideration of the jury."

The evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff in his amended petition.

In *St. Louis & San Fran. R. R. Co. v. Conarty*, 238 U. S. 243, it appeared that the injuries sued for "were received in a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, these having been pulled out while the car was in transit. \* \* \* The deceased and two companions were standing on the foot-board at the front of the switch engine and when the car was observed his companion stepped to the ground on either side of the track, while he remained on the foot-board and was caught between the engine and the body of the car at the end from which the coupler and drawbar were missing. Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated \* \* \*." On page 249 the court says:

"The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would have not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable \* \* \*."

The foregoing principles are applicable to the present case. The failure to provide wire and the direction of the foreman to procure it was not likely to result in injury to any one. Neither was the failure of the foreman to inspect the wire after it was found. When the purpose for which the wire was desired is considered, it is plain that an injury was not likely to result from the failure to inspect it.

In *Pryor v. Williams*, 254 U. S. 43, it appears that the plaintiff was directed to use a clawbar, a defect in which caused it to slip and the plaintiff to lose his balance and fall to the ground, twelve feet below. "The conclusion of the trial court was that, 'The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff'. And further, 'The risk was just as obvious as the defect. This was a simple tool, which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it'."

The Supreme Court of Missouri reversed the judgment, but this court sustained the conclusion of the trial court hereinbefore set out.

In *Lang v. New York Cent. R. R. Co.*, 255 U. S. 455, it is said:

"Failure of a railroad to equip a car with automatic couplers as required by the Safety Appliance Act will not render it liable to an employee for an injury of which the delinquency was not the proximate cause."

This was an action for personal injuries resulting as follows:

"A car without a drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was



crushed between the car upon which he was riding and the defective car."

The defendant contended:

"The proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause."

On page 461 the court says:

"The movement of the colliding car was in the daytime and the situation of the defective car was not only known and visible, but its defect was known by Lang. He, therefore, knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. 'It evidently was not,' the trial court said, 'the intention of any of the crew \* \* \* to disturb \* \* \* the crippled car.' It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it 'so as not to come in contact with the crippled car,' to quote again from the trial court. That duty he failed to perform, and, if it may be said that, notwithstanding, he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, still 'the collision was not the proximate result of' the defect. Or, in other words, and as expressed in effect in the *Conarty Case*, that the collision under the evidence cannot be attributable to a violation of the provisions of the law 'but only that had they been complied with it (the collision) would not have resulted in the injury to the deceased'."

See also *State v. Ellison*, 196 S. W. 1088 (Supreme Court of Missouri), in which it is said:

"A negligent act does not proximately cause an injury which could not have been reasonably anticipated."

In *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 36 Sup. Ct. Rep. 406, the Court says (we quote from the syllabus in the Supreme Court Reporter):

"There is no room for the application of the rule of comparative negligence established by the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 25, Chap. 149, Comp. Stat. 1913, Section 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

In *Milwaukee, etc. Ry. Co. v. Kellogg*, 94 U. S. 469, the court holds:

"A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances \* \* \*."

See also—

*McGill v. Michigan S. S. Co.*, 144 Fed. 788 (C.C.A., 9th Cir.), (Writ of Certiorari denied, 203 U. S. 593),

*Western Union Telegraph Co. v. Hall*, 287 Fed. 297,  
*Bryant v. Beebe & Runyan Furniture Co.*, 78 Neb. 155,

*Kitchen v. Carter*, 47 Neb. 776,

*Merkouras v. C., B. & Q.*, 101 Neb. 717,

*Williams v. Hines*, 109 Neb. —, 189 N. W. 623. 624.

"A party is only answerable for the natural, probable, reasonable and proximate consequences of his acts; and

where some new efficient cause intervenes not set in motion by him and not connected with, but independent of, his acts, not flowing therefrom and not reasonably in the nature of things to be contemplated or foreseen by him and produces the injury, it is the proximate and dominant cause."

*Kitchen v. Carter*, 47 Neb. 766.

In proceedings brought under the Federal Employers' Liability Act, "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery." *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367. At page 371 in the Harris case the court says:

"The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case*, 15 Wall. 524, 537; *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 501, 502; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 339; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 150. These established principles and our holding in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 511, 512, we think, make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The *Nitro-Glycerine Case*, 15 Wall. 524, cited approvingly by the court in the Harris case, was an action for damages caused by the explosion of nitro-glycerine while employees of an express company were opening the case containing it, to repair a leak therein. They did not know

what it was or that it was dangerous. The court held that there was no liability. At page 536 the court says:

"The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. 'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.

\* \* \* \* \*

"Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer of his misfortune."

In *Cleghorn v. Thompson*, 62 Kans. 727, 64 Pac. 605, the court quotes approvingly from *Pollock on Torts* as follows:

"Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would im-

pose so great a restraint upon freedom of action as materially to check human enterprise'."

In the same opinion the court quotes approvingly as follows from *Thompson on Negligence*:

"'It is conceded by all the authorities that the standard by which to determine whether the person has been guilty of negligence is the conduct of the prudent, careful, diligent, or skillful man in the particular situation'."

In *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, the court says:

"In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the traveling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. \* \* \* When a railroad is built, it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it \* \* \*."

It is obvious that an accident such as befell the plaintiff could not have been anticipated from the failure to have a supply of wire on hand; it is obvious that such an accident could not have been anticipated from complying with the order of the foreman to get wire, and it is also obvious that such an accident could not have been anticipated from the failure of the foreman to inspect a piece of wire to be used to tie a cloth to a cable.

*Pryor v. Williams*, 254 U. S. 43,  
*Vanderpool v. Partridge*, 79 Neb. 165.

The plaintiff knew that he had two fragments of wire, too short to use, with something attached to the ends thereof. He had not been directed to use any such appliance, either by the foreman or by E. W. O'Hara, and there is no testimony in the record showing "that it was negligently given to him as a part of the tools and materials with which he was supplied for his said work," as alleged in the petition. If he was, in fact, trying to straighten the wire when he was injured it is plain that the wire had not been furnished him for the purpose alleged in his petition. E. W. O'Hara did not give him the wire either to use or straighten, and he was in no different position than if he had found it himself and undertaken to straighten it. There is nothing in the record to show that E. W. O'Hara knew, or should have known that the plaintiff intended to straighten the wire attached to the cap, or to make any use of it in connection with the work. The record affirmatively shows to the contrary, for E. W. O'Hara testified that he was about to throw the cap away after he severed it from the wires and had no further use for it. Under the circumstances disclosed by the evidence, E. W. O'Hara could not have supposed that the plaintiff intended to make any use out of the cap, or the small fragment of wire attached thereto. He did not "furnish" him the wire to tie the cloth with and the plaintiff's own testimony so shows, as well as the testimony of E. W. O'Hara.

Nor is the evidence sufficient to establish any negligence on the part of E. W. O'Hara in complying with the plaintiff's request to give him the cap. E. W. O'Hara had never seen such a cap and did not know what it was. He could have anticipated no harmful consequence from handing to the plaintiff a cap which he himself had roughly handled without injury.

When the plaintiff undertook to handle a foreign article, he assumed the risks incident thereto. He was a mere volunteer when he asked for and received the cap and exploded it.

It was the cap and not the wire that the plaintiff desired. If E. W. O'Hara had been in the act of throwing aside such a fragment of wire without a cap attached thereto, it is plain that the plaintiff would not have gone to the trouble to pick it up or straighten it, but would have understood from the fact that his uncle was discarding it that it was not fit for use. According to the plaintiff's own testimony, he stood idly by watching the other men until he saw the cap. Until that time, he had not made any effort to search for wire or to help tie the cloths to the cable. The record discloses that the plaintiff was not acting within the course or scope of his employment when he was injured. The record fails to show any actionable negligence on the part of the defendant or his agents. The record does show that the plaintiff knew as much about the dangers incident to the work as any of the other men, and he, therefore, assumed the risk.

*Pryor v. Williams*, 254 U. S. 43.

Assumption of risk is a complete defense to actions brought under the Federal Employers' Liability Act, except where the negligence of the carrier is in violation of some statute enacted for the safety of employees. *Jacobs v. Southern Railroad*, 241 U. S. 229; *Boldt v. Pa. R. Co.*, 245 U. S. 441.

E. W. O'Hara cannot be imputed with knowledge of the fact that the cap was dangerous without also imputing such knowledge to the plaintiff. The plaintiff was not injured from any act on the part of E. W. O'Hara, but was injured, according to his testimony, by accidentally striking the cap against the rail.



**The evidence does not show that the plaintiff when injured was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.**

The undisputed evidence showed that the gantry was supplied with the usual number of ropes and chains on the day of the accident (Rec., pp. 85 to 87, Qs. 704 to 740).

The men were making the sling for handling lumber, poles, or any other wood. They had no sling prior to the accident (Rec., p. 88, Qs. 753 and 754). They were making the sling out of a piece of cable they had in the tool house (Rec., p. 88, Q. 759). The sling was not to be permanently attached to the gantry, but was to be used the same as the chains and ropes with which the gantry was supplied were used (Rec., p. 89, Qs. 771 to 775). The sling was not completed before the accident, and they did not transfer any more cars until two days after the accident, or until September 15th. They did not use the sling in transferring them. They started transferring a car of poles on September 15th and finished it on the 16th and did not use the sling for that purpose (Rec., p. 90, Qs. 775 to 793).

The plaintiff was not engaged in interstate commerce, even if he were assisting the men in making this sling when he was injured, which we deny. The sling which the men were making was a new appliance and had not been devoted to commerce of any kind at the time of the accident. Under the circumstances, the men engaged in making the sling were not engaged in interstate commerce any more than a blacksmith would have been had he been making the sling in question in his own shop.

*Industrial Accident Commission of State of California, et al, v. Payne, Agent, 42 Sup. Ct. 489, and cases cited therein.*

We believe that the District Court of Douglas County, Nebraska, was without jurisdiction; that the federal right

to exemption from suit in that county was consistently urged at every appropriate stage of the proceedings in exact compliance with previously settled rules of local practice; that that right was not and could not by its assertion be waived; and that the court erred in permitting the substitution of the petitioner as the defendant in said action. If we are correct in these contentions, it will, of course, be unnecessary for the court to pass upon the other questions involved; but if the court finds it necessary to pass upon such questions, we believe it should hold that the evidence does not sustain the verdict for the reasons hereinbefore stated.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1924.

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No. 63

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JAMES C. DAVIS, AGENT OF THE PRESIDENT,  
UNDER SECTION 206 OF THE TRANSPORTA-  
TION ACT, 1920,

*Petitioner,*

vs.

JOHN O'HARA.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA.

---

REPLY BRIEF OF PETITIONER.

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## STATEMENT

On pages 8 and 9 of his brief, the respondent says:

“The questions of whether Respondent was injured by Petitioner’s negligence; whether he had assumed the risk; whether Petitioner was engaged in interstate commerce; whether the venue objection was waived by failure to cross-appeal were all finally determined on first appeal.

“On the second appeal of this action Petitioner sought to review these same holdings adjudicated on first appeal. The Supreme Court of Nebraska refused to permit a review of these settled questions, holding that such review should have been sought upon motion for re-

hearing at the time of the first appeal; that the questions had become *res adjudicata* and the law of the case. No new or different decision was rendered on second appeal upon any of these questions nor were they considered nor mentioned other than to apply the rule, *law of the case*.

"A single exception exists to this statement and that is in reference to the venue question. This was discussed from several different angles and several specific waivers of the objection noted. The Supreme Court of Nebraska disposed of the question upon the specific grounds that the former opinion, holding this question to have been foreclosed by failure to cross-appeal, *was also settled under the law of the case* (Rec. p. 202).

"Insofar, then, as all questions arising on first appeal and disposed of on first appeal are concerned they are not proper questions and especially to review in this court under the second trial records procured by Petitioner. Without having obtained a writ of certiorari to review the first trial or any rulings therein, but confining himself to the last trial, Petitioner asks this court to hold that all the findings of the Supreme Court of Nebraska on the *first appeal were erroneous*. Petitioner asks the court to base its review of first trial questions—not on the first trial proceedings—but *upon those of the second trial*. Petitioner's position is a very novel one. How can this court say that the record of evidence on first appeal does not show Petitioner to have been guilty—as found by the Supreme Court of Nebraska—of 'culpable negligence?' How can this court say that the first trial record did not show Respondent to have been engaged in interstate commerce and to not have assumed the risk? How can this court say that the Supreme Court of Nebraska erred in its holding that Petitioner failed to perfect a cross-appeal upon the venue question and that by reason thereof waived such objection even if properly made?

"Another thing of great importance faces Petitioner. That is the decision on second appeal merely applying the rule *law of the case* to these questions *was not the decision of any federal question*. This was a decision upon a non-federal ground—one of general practice.

"We will now treat the matter above discussed by analysis.

*"(a) Proceedings on first trial and appeal not reviewable because not appealed from.*

"The decision upon these questions upon first appeal was final within the meaning of Section 237 of the Judicial Code. A review of these points decided on first appeal can be had only by a review of the first trial proceedings. \* \* \*

*"(b) The decision on second appeal applying the rule law of the case was a decision based upon non-federal ground and therefore not reviewable here.*

\* \* \* \* \*

*"(c) The proper and exclusive method of reviewing the decision on first appeal was by motion for rehearing, as a foundation for further appeal."*

The case was tried twice. On the first trial the court, after the parties had introduced their evidence and rested, directed the jury to return a verdict for the defendant and judgment was entered in accordance with the verdict (Addition to Record Pursuant to Order of January 14, 1924, pp. 3-4). The plaintiff filed a motion for a new trial on the statutory grounds, including, among others, the ground that the court erred in directing a verdict for the defendant and also the following additional ground:

"11. Irregularities in the proceedings of defendant in that defendant on or about the 16th day of April, 1920, procured an order in the District Court of Pottawattamie County, Iowa, restraining plaintiff from prosecuting this action; that said restraining order also restrained John O'Hara from further prosecuting this action and that said restraining order was left pending in said court and said action never dismissed and that the same now is pending, though defendant has been enjoined by the District Court of Douglas County, Nebraska, from proceeding further in said suit in Pottawattamie County, Iowa; that the pendency of the Pottawattamie County action has prevented plaintiff from



having a fair trial of his action in this Court, and has embarrassed him in obtaining witnesses and preparing his case, and that by the bringing, maintaining and failing to dismiss said Pottawattamie County action the defendant has been guilty of misconduct to the prejudice of plaintiff's having a fair trial hereof". (Addition to Record, p. 5).

This motion for a new trial was overruled (Addition to Record, p. 6) and the plaintiff appealed to the Supreme Court. It held (par. 3 of the syllabus, R., p. 209), "that it was error for the trial court to instruct the jury to return a verdict in favor of defendant" and reversed the case and remanded it for further proceedings. The court did not pass upon the question of jurisdiction on the first appeal and assigned as its reason for not doing so that this question was not before it because the defendant had failed to prosecute a cross-appeal from the judgment in his favor, as appears from the following quotation from the opinion on the first appeal:

"Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the director general of railroads set out as a part of the motion provided that suits against the director general of railroads, as authorized by general order No. 50-A should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now (See subdivision b, Rule 18 of this court." (Rec., p. 213).

Under the State practice, the plaintiff's appeal was from the order overruling the motion for a new trial, and when the case was reversed it stood in all respects the same

as if the trial court had ordered a new trial in the first instance. In other words, the appellate proceedings resulted in setting aside the judgment in favor of the defendant and the case then stood as if it had never been tried. There were no final orders against either party.

*Cerny v. Paxton & Gallagher Co.*, 83 Neb. 88. Paragraph one of the syllabus in this case is as follows:

"Where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

On page 90 of the opinion the court says:

"When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code (section 8825, Compiled Statutes of 1922) as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial \* \* \*."

The court further says (p. 91):

"We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon the issues of fact. The plaintiff cites, and quotes largely from the opinion, in the case of *Lisbon v. Lyman*, 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character and provide for specific findings of the different issues submitted

to that body. They fail, however, to convince us that such is the law; and until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We, therefore, must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

Section 314 of the code mentioned above is Section 8825, Compiled Statutes of 1922, and reads as follows:

"A 'new trial' is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

"Second. Misconduct of the jury or prevailing party;

"Third. Accident or surprise, which ordinary prudence could not have guarded against;

"Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property;

"Sixth. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;

"Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial;

"Eighth. Error of law occurring at the trial and excepted to by the party making the application."

The respondent, plaintiff in the action below, asked for a new trial under this section of the statute and the Supreme Court gave him what he asked for. After the Supreme Court reversed the case on the first appeal, there was no judgment, final or otherwise, against the petitioner, defendant below, and there was no final order from which he could prosecute proceedings to this court.

The mandate issued by the Supreme Court on the first appeal, set out at page 21 of the record, omitting the formal parts, recites that it is considered by the Supreme Court that the judgment rendered by the district court "in favor of said defendant and against said plaintiff be reversed at the costs of said defendant taxed at \$137.00 and cause remanded for further proceedings. Now, therefore, you are commanded, without delay, to proceed according to law," that is, to try the case *de novo*.

In accordance with the above mandate, the case was tried the second time *de novo*. A jury was empaneled, both parties introduced their evidence, the court instructed the jury, it returned a verdict in favor of the plaintiff for \$46,840.11, and the court entered judgment thereon (R., pp. 22-32). The defendant filed a motion for a new trial, which was overruled (R., pp. 33-35), and he appealed to the State Supreme Court. It affirmed the case on condition that the plaintiff remit from his judgment all in excess of \$37,500, which was done and the judgment of the District Court in that sum was affirmed (R., pp. 202-203). The defendant filed a motion for rehearing which was overruled. (R., pp. 204-205).

Paragraphs 1 and 2 of the syllabus (which in Nebraska is the law of the case, *Holliday v. Brown*, 34 Neb. 232), read as follows:

"1. There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.

"2. An action for damages against the director general of railroads under the federal employers' liability act is both local and transitory under general order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the director general specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer." (R., p. 196).

In the opinion (R., p. 197) the court says:

"This case is here for the second time. At the first trial evidence was taken and both parties rested. A motion of defendant to direct a verdict in its favor was sustained, and the action dismissed. On appeal to this court the judgment was reversed and the cause remanded for further proceedings. *O'Hara v. Hines*, 108 Neb. 74, 187 N. W. 643. Upon a second trial plaintiff recovered a judgment for \$46,840.11, and from this judgment this appeal is taken."

The court further says in the opinion (R., p. 198):

"It is strongly urged that the court had no jurisdiction of the person of defendant or the subject-matter of the action. \* \* \*"

The court further says (R., p. 201):

"It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction."

"Did the district court have jurisdiction of the subject-matter of the action? \* \* \*" This question is answered by the court in the affirmative.

It is the judgment of the State Supreme Court, entered on the second appeal, that is the subject of this proceeding.

### ARGUMENT

The above contentions of the respondent are all settled against him by the following decisions of this Court:

*Georgia Railway Co. v. Decatur*, 262 U. S. 432, was a suit brought to enjoin a proposed increase in street car fares. An interlocutory injunction was granted by the trial court which was affirmed on writ of error by the State Supreme Court. "Thereafter, the case having been remanded, defendants were allowed to amend their answer and crossbill in several particulars. A general demurrer to these amended pleadings was sustained in part; and a jury, impaneled to try the remaining issues, found for the plaintiff by direction of the court, upon which a final decree was entered. A second writ of error from the State Supreme Court followed. That court held that its judgment upon the first writ of error became the law of the case and was *res judicata* and therefore precluded a further review, and the decree of the trial court was affirmed. Deprivation of rights under the Federal Constitution was duly and properly asserted. The case is here on writ of error. \* \* \*" The court says:

"Preliminarily, defendant in error insists that the decision of the State Supreme Court on the first writ of error affirming the interlocutory order of the trial court, was a final adjudication from which a writ of error from this Court might have been sued out, and, hence, that we are precluded from considering the present writ of error. *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, is cited and relied upon; but that case furnishes no support to the contention. There the trial court had adjudged the title to a piece of land to be in the defendant. Upon appeal the State Supreme

Court reversed this judgment and remanded the case with directions to enter judgment awarding plaintiff title to a right-of-way over the land. The trial court followed this direction. Plaintiff again appealed, insisting, as it had done before, that it had title in fee simple; but the appellate court declined to consider the question, holding that the former decision concluded the court as well as the parties. This Court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a final decree; and it was upon this decree that the second writ of error was brought. We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect to its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214; *Zeckendorf v. Steinfeld*, 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases cited.

"We hold, therefore, that the writ of error was properly brought and come to a consideration of the substantive matters presented."



*C. & O. Ry. Co. v. McCabe*, 213 U. S. 207, is clearly and correctly summarized in a note to Section 1214, Compiled Statutes 1916, Vol. 2 (Judicial Code, Section 237) as follows:

"A judgment affirming, on a third appeal, a judgment entered on a verdict in favor of plaintiff, is the first final judgment in the action which is reviewable, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a Federal Circuit Court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, though the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the federal question."

The first appeal in the McCabe case was from an order granting a petition for removal to the Federal Court, and the Appellate Court reversed the order and remanded the case for trial.

At page 214 of the opinion the court says:

"Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined in the judgment now under review to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser v. Hemphill*, 198 U. S. 173, and cases therein cited."

See also *Bruce v. Tobin*, 245 U. S. 18, and *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99.

In *Zeckendorf v. Steinfeld*, 225 U. S. 445, the court says:

"Whatever effect the decision of the Supreme Court of a territory may have, as the law of the case, on the lower court or on the Supreme Court itself, prior to an appeal to this court, it is not the law of the case for this court."

In *U. S. v. D. & R. G.*, 191 U. S. 84, 93, the court says:

"While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

The record shows that the contention of the respondent that the case should be dismissed for lack of a federal question is without merit. The case is brought under the federal Employer's Liability Act and in proceedings brought under this Act,

"rights and obligations depend upon it and applicable principles of common law as interpreted and applied by federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 501, 502; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 339; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 150; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172. \* \* \*

*New Orleans and N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371.

See also *Central Vermont Ry. Co. v. White*, 238 U. S. 507.

The question raised with respect to the general orders of the Director General is a federal question. A reading of the opinion shows that the state court affirmed the judgment of the District Court because it thought that the plaintiff had proved a case under the federal Employer's Liability Act, and because it thought that the case was both local and transitory under General Order No. 18-A and that the District Court of Nebraska had jurisdiction over the subject-matter of the action although the plaintiff's cause of action arose in Iowa, of which state he was a citizen and resident. The opinion also shows that the State Supreme Court thought that where the Director General appeared specially by filing a motion to quash the summons, as was done in this case (R., p. 6), he entered a voluntary appearance and gave the District Court of Douglas County, Nebraska, jurisdiction, or in other words, that he thereby waived the provisions of General Order No. 18-A, as amended by General Order No. 18-B. It is clear that these are all federal questions.

In addition to this, the suit is against the Director General and is in effect a suit against the United States.

*Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554;

*Sandoval v. Davis*, 278 Fed. 968;

*Hines v. Dahn*, 267 Fed. 105;

*Dahn v. Davis*, 258 U. S. 421, 42 Sup. Ct. Rep. 320.

In *DuPont De Nemours & Co. v. James C. Davis*, 44 Sup. Ct. Rep. 364, the court says:

"In taking over and operating the railroad systems of the country, the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' *North Carolina R. R. Co. v. Lee*, 260 U. S. 16, 43 Sup. Ct. 2, 67 L. Ed. 104; *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; *In re Tidewater Coal Exchange (C.C.A.)*, 280 Fed. 648,

649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. Section 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, *Ches. & Del. Canal Co. v. United States*, 250 U. S. 123, 126, 39 Sup. Ct. 407, 63 L. Ed. 889; *In re Tidewater Coal Exchange*, *supra*; and therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 31; *United States v. Whited & Wheelless*, 246 U. S. 552, 561, 38 Sup. Ct. 367, 62 L. Ed. 879. Statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the government. *United States v. Whited & Wheelless*, *supra*."

**The rights of the Director General cannot be defeated under the name of local practice.**

Nor does the fact that the defendant failed to file a motion for rehearing in the first appeal take this case out of the rule laid down by the above decisions. There is no Nebraska statute which requires a motion for rehearing to be made. The only provision for such a motion is found in a rule of the Supreme Court which provides:

"All motions for rehearing must be printed and may be filed as of course at any time within 40 days from the filing of the opinion or rendition of the judgment of the court in the case, provided that in Workmen's Compensation cases motions for rehearing must be filed within 15 days from date of the filing of the opinion. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rules 12 and 13. Fifteen copies must be filed with the clerk. In original cases where the error assigned

is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 8826, Compiled Statutes, 1922, and may be typewritten.

"No mandate will issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties."

Section 8826, Compiled Statutes, 1922, provides:

"The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

It will be noted that the rule simply permits the filing of a motion for rehearing but does not require it as a prerequisite to appealing from a judgment rendered at a subsequent trial, had in accordance with the mandate entered in cases, such as this, where the case is reversed on the first appeal and remanded for a new trial.

The first appeal was argued twice. The first argument was on May 24, 1921. November 18, 1921, the court ordered a re-argument, which was had January 3, 1922 (Addition to Record, pp. 27-33). Briefs were filed by both parties. The Supreme Court, as stated before, held that the trial court erred in instructing a verdict instead of submitting the case to the jury, and reversed it on this ground. It also held that the jurisdictional question was not before it, because the defendant had not filed a cross-appeal from the judgment in his favor, and the first appeal left this question undecided. The court does not suggest in its

opinion, entered on the second appeal, that there were any grounds upon which it would have granted a motion for a rehearing if it had been filed, but on the contrary maintains that the first decision is correct. Under these circumstances, it is plain that the failure of the defendant to file a motion for a rehearing is immaterial and does not constitute a sufficient ground for the dismissal of this proceeding. See *Pendergast v. N. Y. Tel. Co.*, 262 U. S. 43, 48.

In the recent case of *Davis v. Wechsler*, 263 U. S. 22, this court decided that:

"Local practice will not be allowed to defeat or to put unreasonable obstacles in the way of a plain and reasonable assertion of federal rights.

"The United States Supreme Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to a federal right, or to bar the assertion of it, even on local grounds."

The Wechsler case was a suit against the Director General for personal injuries received by the plaintiff upon a railroad while it was under federal control. The suit was brought in the Circuit Court of Jackson County, Missouri.

"The cause of action arose in another county and the plaintiff then and when the suit was brought resided in Illinois. \* \* \*

"The defendant pleaded a general denial and also that the Court was without jurisdiction because of the foregoing facts. The plaintiff by replication relied upon the invalidity of the order, a point now decided against him. \* \* \* On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920 (41 Stat. 456), was substituted by agreement as successor of Hines, and according to the record the 'substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant.' It was not disputed and was stated by the Court below

that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits, but it was held by the Court of Appeals affirming a judgment for the plaintiff that the provision in General Order 18-A went only to the venue of the action and was waived by the appearance of Payne. A similar effect was attributed to the appearance of the present petitioner, Davis, in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

"We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed, when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22, 40, Sup. Ct. 419, 64 L. Ed. 751. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246, 32 Sup. Ct. 822, 56 L. Ed. 1074. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co. v. Levee*, 44 Sup. Ct. 11, 67 L. Ed. —, decided this day.

"The Transportation Act of 1920 (Act Feb. 28, 1920.



c. 91, Sec. 206, (a) and (d), 41 Stat. 456, 461, 462) in no way invalidates a defense good when it was passed."

See also *Munter v. Weil Corset Co.*, 261 U. S. 276.

In *Railroad Commission v. Eastern Texas Ry. Co.*, 44 Supreme Court Reporter, 247, 249, the Wechsler case is cited approvingly. See also *Ward v. Love County*, 253 U. S. 17, 22.

In *Hill v. Smith*, 260 U. S. 592, paragraph 1 of the syllabus reads:

"A federal question which was treated as open, and decided, by the State Supreme Court, will be reviewed here without inquiring whether its federal character was adequately called to the attention of the state trial court."

On page 594 of the opinion in this case it is said:

"It is argued for the respondent that there is no jurisdiction in this Court because the attention of the trial judge was not called specifically to the Bankruptcy Act as a ground for the rulings asked, and because, even if it had been, it is said, the burden of proof is to be determined by the practice of the State. As we are of opinion that the judgment was right we shall not discuss these objections at length. We deem it enough to say, as to the first, that the appellate Court treated the question as open and decided it; and as to the second that here, as in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed so flows from the words of the statute—that the ruling upon it may be reviewed here."

In the present case the federal questions, including the question as to the jurisdiction of the court, were asserted by the defendant at the proper time and in the proper man-

ner under the state system of pleading and practice. That part of the decision of the State Supreme Court holding that the Director General waived the benefit of his general order by appearing specially and asking the Court to quash the service was evidently rendered in a spirit of evasion for the purpose of defeating a federal right, as this holding is in direct conflict with all previous Nebraska decisions upon this subject, which, as stated by Judge Letton in his dissenting opinion, the court overrules without mention. (Rec., p. 202).

Prior to the decision in the present case, the Supreme Court of Nebraska in disposing of questions of jurisdiction had by repeated decisions settled the rule of practice in Nebraska to be the same as the Wechsler case discloses the Missouri practice to be, namely, that the defendant had a right to unite a plea to the jurisdiction and a defense on the merits. The Nebraska decisions settling this rule are cited on page twenty of the petitioner's first brief herein, but for the convenience of the court we desire to quote from them more fully than we have done in that brief.

The following decisions of the Supreme Court of Nebraska settle the Nebraska practice to be as stated above.

The case of *Baker v. Union Stock Yards National Bank*, 63 Neb. 801, is in point. The court says, page 803 of the opinion:

"A succession of well-considered cases has settled the law of this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. *Omaha Loan & Trust Co. Savings Bank v.*

*Knight*, 50 Neb. 342; *Ley v. Pilger*, 59 Neb. 561. But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have. *Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Herbert v. Wortendyke*, 49 Neb. 182; *Barry v. Wachosky*, 57 Neb. 534, 535; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728. While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in cases of this character. No special appearance or preliminary objections were made in *Hurlburt v. Palmer*, *supra*, or *Herbert v. Wortendyke*, *supra*, and the provisions of sections 94 and 96 of the Code of Civil Procedure, taken together, would seem to make it clear that they were not required. See also *Kyd v. Exchange Bank of Portland*, 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

In *Stelling v. Peddicord*, 78 Neb. 779, the court holds:

"If a defendant claims that the court has acquired no jurisdiction over his person by reason of defects or irregularities in the process or service thereof, his course is by special appearance and objections to the jurisdiction, and, if he goes further and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process or service thereof, the defects are waived. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801.

"But where for some reason the defendant is privileged from suit in the county where, or at the time when he is sued, he may set up want of jurisdiction of

his person by answer, along with any other defenses he may have, without first making a special appearance or preliminary objections."

On page 781 of the opinion the court says:

"But the second objection is of a different character. It goes more to the venue. It amounts to a claim of immunity from the lawful service of summons in the county where the action was brought. In such case, where the ground of the objection does not appear on the face of the record, the proper practice is to plead to the jurisdiction, and this plea may be joined with a plea to the merits. *Baker v. Union Stock Yards Nat. Bank, supra*. It is not necessary that an objection of this kind should be first urged on special appearance. It would follow, then, that, while the first objection was waived by defendant's general appearance and plea to the merits, the second was available as the basis of a plea to the jurisdiction, and one of the questions now presented is whether the evidence is sufficient to sustain a finding against the defendant on the issues tendered by that plea."

"From the evidence that went to the jury on that issue it conclusively appears that when this suit was instituted the defendant's principal place of business was in the state of Missouri, and that its members resided in that state, and were not in Franklin county. The evidence allows the inference that Chaney, the alleged agent upon whom service was made according to the officer's return, was acting as the defendant's agent in buying horses and mules and shipping them to the defendant in Missouri. His agency, however, was in the nature of a roving commission. He bought whenever he could, and shipped from the most convenient point. He was in charge of no office or place of business owned or kept by the defendant, nor did the defendant own or maintain any place of business in the county in which the venue was laid. In short, there was no place in that county that could be called the defendant's 'usual place of doing business.' Section 24 of the code provides that a copartnership may sue and be sued by the firm name. Section 25 provides that process against

any such company or firm shall be served by a copy left at their usual place of doing business within the county, with one of the members of such company or firm, or with a clerk or general agent thereof. In this case, as both members of the firm were outside the state, service could only be made by a copy left with a clerk or general agent of the defendant at its 'usual place of doing business within the county,' and, as there was no such place, it is clear that service of summons could not be made. The defendant, then, was privileged from suit in that county because it was out of reach of the process of the court. Its plea to the jurisdiction is not a mere technical objection, but is in the nature of a protest against being dragged into a foreign jurisdiction to defend against a suit, and should have been sustained. *Baker v. Union Stock Yards Nat. Bank*, *supra*, and citations.

"It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

"Duffie and Jackson, C.C., concur.

"By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law. REVERSED."

In *Herbert v. Wortendyke*, 49 Neb. 182, paragraph 2 of the syllabus reads:

"Objections to the jurisdiction which do not arise upon the summons, the indorsement, or service, thereof, or upon the face of the petition, may be raised by answer in connection with matter in bar. *Hurlburt v. Palmer*, 39 Neb. 158, followed."

The court in its opinion reviews a number of cases and concludes as follows (p. 185):

"It is established by these cases, in accordance with the plain language of Sections 94 and 96 of the Code of Civil Procedure, that where a want of jurisdiction does not appear on the face of the record it may be

pleaded by answer in connection with pleas in bar. Here the petition was one in trover, and the facts disclosing the want of jurisdiction did not appear on the face of the record. About seven months after the answer was filed there was filed the following: 'We hereby authorize Bush and Comstock to appear for us in the above entitled action as our attorneys and to take charge of, manage, and defend the same in our behalf.' This was signed by Wortendyke and Spelts. It is contended that this waived the question of jurisdiction. It was not strictly an appearance but a power of attorney to make an appearance. But aside from that, if want of jurisdiction of the person may be averred by answer in connection with pleas at bar, it follows that one has the right at the same time to defend to the merits and to the jurisdiction, and we cannot see that this paper was any more a general appearance than appearing at the trial and defending to the merits. For the foregoing reasons we think the District Court of Lancaster County was shown by the evidence to be without jurisdiction so far as Wortendyke and Spelts were concerned. \* \* \*

In *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557, (cited above), it was contended that the defendant had waived the question of jurisdiction. The court says (p. 561):

"The amended petition did not disclose the want of jurisdiction. The defendant did not demur to that, but he answered; and this was the proper method of objecting to the jurisdiction, even of the person of the defendant, where the want of jurisdiction did not appear from the summons, or return, or the petition itself. \* \* \*

In *Barry v. Wachosky*, 57 Neb. 534, the court holds:

"Where a defendant objects specially to the court's jurisdiction over him and, that being overruled, pleads generally to the merits and interposes as a defense in his answer the facts showing the court's want of jurisdiction, he does not thereby waive the objection that the court had no jurisdiction over him."

In *Stull Bros. v. Powell*, 70 Neb. 152, the court holds:

"A non-resident defendant may join a plea to the merits with a plea to the jurisdiction, where the facts as to the latter are not apparent on the face of the record.

"Where the question of jurisdiction is thus litigated, the non-resident defendant does not, by appealing from a county court's adverse decision, waive his plea to the jurisdiction."

In *Templin v. Kimsey*, 74 Neb. 614, the court holds:

"Where the want of jurisdiction does not appear upon the face of the record, it may be pleaded with other defenses in the answer.

"That the defendant in a case of that kind first raised the question of jurisdiction on a special appearance, which was overruled, does not affect his right to include a plea to the jurisdiction with other defenses in his answer."

In *Hurlburt v. Palmer*, 39 Neb. 158, the court considers the question as to whether or not the defendant waives the objection to being sued in a wrong jurisdiction by joining in the answer with the defense as to the jurisdiction, such other defenses as he may have, and holds that he does not.

On page 179 of the opinion the court refers to Section 94 of the Code of Civil Procedure (Comp. Stat. 1922, Sec. 8610) providing that:

"The defendant may demur to the petition only when it appears on its face either, first, that the court has no jurisdiction of the person of the defendant or the subject of the action, etc."

And also refers to Section 96 (Comp. Stat. 1922, Sec. 8612) providing:

"When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objec-



tion may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, etc."

The court says:

"By this section it is expressly provided that the failure to make objection by answer, where the defect does not appear upon the face of the petition, shall be deemed a waiver of such defect; that is to say, the failure to raise by answer the question of jurisdiction, arising as it did in this case, must be deemed a waiver of all objections on that score. It is a harsh and unnatural construction, and one in direct contravention of the provisions of this section, to hold that by taking objections to jurisdiction in the manner provided thereby, the defendant waives the very objections he shall be deemed to have waived unless he proceeds in that very manner. In view of all the considerations to which attention has been challenged, we conclude that the district court erred in sustaining the objections made to the evidence offered for the purpose of showing that the court had no jurisdiction of the persons of the plaintiffs in error."

The first paragraph of the syllabus in *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, is as follows:

"Under the provisions of our Code it is proper to plead as a distinct defense any facts not disclosed by the petition from which it appears that the court has not acquired jurisdiction of the person of the defendant or the subject of the action."

In the *Anheuser-Busch* case it appears that the plaintiff brought an action against Adolphus Busch and the Anheuser-Busch Brewing Association to recover damages which the plaintiff alleged he sustained by reason of the fact that the defendants "hailed and dumped" large quantities of earth onto a lot controlled by the defendants, which resulted in diversion of water upon the plaintiff's premises.

"Personal service of summons was made upon the defendant Busch in the city of St. Louis, in the state of Missouri, who entered a special appearance and moved to quash the service of summons against him on the ground that it was unauthorized by statute and void. Said motion having been overruled, he answered, first, challenging the jurisdiction of the district court, by proper averments alleging that the service of the summons in the state of Missouri was without authority of law and conferred upon the court no jurisdiction of his person; second, a plea to the merits, which need not be noticed in this connection. The Brewing Association filed an answer, which, after admitting its possession of lot 9 by virtue of a lease from its co-defendant, Busch, is in effect a general denial. Upon the issues thus formed a trial was had, resulting in a verdict against both defendants; whereupon separate motions were made for a new trial, which were overruled, and judgment entered in accordance with the verdict, and which is the judgment complained of in the proceeding.

"We will first consider the question of the jurisdiction of the district court of the defendant below, Busch. It is said by counsel for the defendant in error that that question is not presented by this record, for the reason that Busch submitted to the jurisdiction of the court by his answer to the merits of the case. There is to be found some support for that contention in the earlier cases in this court, but in *Hurlburt v. Palmer*, 39 Neb. 158, the cases were subjected to a careful examination, and the conclusion announced that under the provisions of the Civil Code it is proper to plead as a distinct defense any facts not appearing from the petition whereby it is made known that the court has no jurisdiction of the person of the defendant or the subject-matter of the action. That case we must regard as decisive of the question under consideration. It was the right and duty of the defendant Busch to direct the attention of the court to the fact that it had failed to acquire jurisdiction of his person by means of its process. That such facts constitute a defense within the meaning of Section 99 of the Code is clear from the reasoning in *Hurlburt v. Palmer, supra*."

Section 8563, Compiled Statutes 1922 (referred to in the decisions hereinafter cited as Section 60 of the Code) provides:

"Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned."

In a number of cases, some of which we will refer to hereafter, a defendant was sued in a county in which he did not reside. He set up this fact in his answer, together with his defenses to the merits of the case. The plaintiff invariably insisted that by so doing the defendant entered a general appearance and that he waived the right to question the jurisdiction of the court. The Nebraska Supreme Court consistently held against this contention.

*Stewart v. Rosengren*, 66 Neb. 445, is such a case. It appears from the opinion in that case that Stewart sued Rosengren and Anderson in Lancaster County. Anderson resided in that county, while Rosengren resided in Saunders County, and summons was issued and served upon him therein.

"In his answer, Rosengren set up these facts, among other things, and alleged that Anderson was a mere nominal defendant \* \* \* and that he had been joined collusively for the purpose of enabling Stewart to sue Rosengren in another county than that in which he resided. \* \* \*

"If jurisdiction over residents of other counties may be obtained in actions upon contracts by the easy device of misjoinder of causes of action, the whole object and purpose of section 60, Code of Civil Procedure, will be thwarted. It is well settled that in an action within the purview of said section 60 in one county, against a defendant who has no real or bona-fide interest in the controversy between the plaintiff and a codefendant resident in another county, a summons cannot be issued and served upon the latter in such other county, and he may avail himself of the want of jurisdiction

over his person by timely plea thereof. \* \* \* This rule is based upon the policy of said section 60, that defendants, except in cases specially provided for, should be sued in the county where they or some of them reside, and is intended to prevent evasion thereof by joining nominal defendant. \* \* \* It will not do to say that the defendants should be left to allege misjoinder, in which case the plaintiff, having brought his defendant into court, would sever, and thus attain his object of evading the provisions of the Code. Such a course savors too much of fictitious proceedings by *ac etiam* and *latitat* for a modern court. Hence, it was necessary for the plaintiff to show that both defendants were liable upon the contract on which he sued; for if Anderson was a nominal defendant as to the cause of action against Rosengren, without any real interest therein, the courts of Lancaster County could not try that cause of action on service in Saunders county merely because Anderson was joined as a defendant.  
\* \* \*

The defendant in the present case simply did what the State Supreme Court had held in many previous decisions it was his right and duty to do when he filed the motion to quash and thereby directed the court's attention to the fact that the suit was brought in the wrong county. (See *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb. 897, ante p. 25).

The plaintiff has cited and relies upon *United States v. Hvoslef*, 237 U. S. 1, and *Thames v. Mersey*, 237 U. S. 22. Each of these cases distinctly recognizes that if the defendant, as the defendant did in the present case, interposes proper objection to being sued in the wrong district, such action will prevent the jurisdiction of the court from attaching.

The Federal statute requires that where the jurisdiction is founded on the fact that the parties are citizens of different states, suits shall be brought only in the district where one of them resides.

The Court in *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, held that:

"Where diversity of citizenship exists so that the suit is cognizable in some circuit court the objection to the jurisdiction of the particular court in which the suit is brought may be waived by appearing and pleading to the merits."

This case also distinctly recognizes that if the defendant, as the defendant did in this case, in timely manner, interposes proper objection to being sued in the wrong district, such action will prevent the jurisdiction of the court from attaching.

As stated above, the defendant in the present case, in the manner established by the repeated decisions of the Supreme Court of Nebraska, interposed proper objection to being sued in the wrong district and he did not waive this right even if it could be waived, which we deny.

**The rights granted by the orders of the Director General were not waived.**

As stated by this court in the Wechsler case, "even if the order went only to the venue and not to the jurisdiction of the court," the Director General "plainly indicated that he meant \* \* \* to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right."

In addition to this, the Supreme Court of Nebraska by repeated decisions had decided that a motion such as the

Director General filed in this case did not constitute a general appearance. The cases supporting this contention are cited on pages 17 to 19 of the petitioner's first brief. The practice of some of the states does not recognize the right to appear specially for any purpose, and in such jurisdictions one who voluntarily enters one of its courts for any purpose is deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, even though the appearance is special and entered for the sole purpose of objecting to the jurisdiction over his person. The decision of the State Supreme Court in the present case in effect, *for the first time*, adopts this rule of practice. Therefore, the Director General could not appear and assert that the suit was brought in the wrong county; or, in other words, he could not object to the venue without appearing and submitting himself to the jurisdiction of the court. This is all he did do by the motion to quash. In other words, the court held that by asserting that he could not be sued, except in the jurisdiction prescribed by his orders, he waived his exemption from suit in the county where the suit was brought.

The State Supreme Court further held that the action is "both local and transitory under General Order 18-A, and the District Courts of this state had jurisdiction over the subject-matter of such action." So far as we know, this question has never been decided by this court and this is one of the questions now before it for decision. In *Camp v. Gress*, 250 U. S. 308, 311, the court says:

"First. The several defendants below, although not citizens of the same State, were all citizens of States other than that of the plaintiff. Hence, the diversity of citizenship requisite to federal jurisdiction existed. *Sweeney v. Carter Oil Co.*, 199 U. S. 252. The objection of John M. Camp is not to the jurisdiction of a federal court but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue. He asserts the personal privilege not to

be sued in a district other than that of his residence, since the action is not brought in the district of the plaintiff's residence. If he were a sole defendant, or if none of the defendants resided in the district where suit was brought, the privilege asserted would be supported by the very language of the statute."

In the present case the Director General by his motion to quash asserted his privilege not to be sued in a county or district other than that of the residence of the plaintiff, or that of the place where his cause of action arose, and the privilege asserted is supported by the very language of the orders of the Director General. General Order No. 50 authorizes suits to be brought against him, subject, however, to the provisions of General Orders Nos. 18 and 18-A. When the plaintiff accepted the benefit of that part of the order which permitted him to bring his suit against the Director General, he was required also to accept that part of the orders which provided where the suit should be brought. It seems to us that under the orders of the Director General it was essential to the jurisdiction that the suit be brought in the county or district where the cause of action arose, or where the plaintiff resided, and that the courts of any other county or district were without jurisdiction.

**The failure of the defendant to file a cross-appeal is immaterial to this proceeding.**

On page 8 of his brief the respondent says:

"The Supreme Court of Nebraska disposed of the (jurisdictional) question upon the specific grounds that the former opinion, holding this question to have been foreclosed by failure to cross-appeal, was also settled under the law of the case."

The Supreme Court on the first appeal held that this question was not before it because the defendant had failed to interpose a cross-appeal and declined to pass upon it. The first appeal, therefore, did not settle this question one way or the other. On the second appeal the court did not



decline to pass upon this question on the ground that the defendant had failed to interpose a cross-appeal in the first appellate proceeding, but on the contrary disposed of the question by deciding that the action is both local and transitory under General Order No. 18-A and that the District Court had jurisdiction over the subject-matter of the action, and further deciding that "where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well-founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer". (R., p. 196.)

The failure of the defendant to file a cross-appeal in the first proceedings is not mentioned by the court in its opinion on the second appeal, and the inference of the respondent that the Supreme Court declined to pass upon the jurisdictional question on the second appeal, on the ground that the defendant had failed to interpose a cross-appeal in the first appellate proceeding, is not in accordance with the facts disclosed by the record. The State Supreme Court did not rest its judgment upon a non-federal ground, but on the contrary passed upon and decided the federal questions raised by the defendant, and the contention that these questions are not before this court because the petitioner failed to file a cross-appeal in the first appellate proceeding in the State court, is without merit.

In addition to this, there is no statute in Nebraska on the subject of cross-appeals. The only thing on this subject is a rule of the Supreme Court which provides that an appellee "may take a cross-appeal by filing with the Clerk \* \* \* a praecipe \* \* \*". It is not the practice under this rule for the appellee to file a cross-appeal where the judgment appealed from is in his favor, so in the present case the defendant could not have prosecuted a cross-appeal in the first appellate proceeding because the judgment from

which the plaintiff appealed was in favor of the defendant. (See *Bragoner v. Stevenson*, 104 Neb. 578; 3 C. J. 635, note 40(a); *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 95; *Rogers v. Penobscot Mining Co.*, 154 Fed. 606-610).

The other questions presented by the record are fully discussed in the petitioner's first brief and we will not lengthen this brief by adding to what has already been said.

Respectfully submitted,

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## PETITION FATALLY DEFECTIVE.

The petition for writ of certiorari filed herein is fatally defective in the following particulars, viz:

**a. The Exhibit Does Not Include All Proceedings.**

Section 3 of Rule 37, Rules of the Supreme Court of the United States, provides:

*"3. Where an application is submitted to this Court for a writ of certiorari to review a decision of . . . any . . . court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed." . . .*

All proceedings had on first trial of this action in the District Court of Douglas County, Nebraska, and in the Supreme Court of Nebraska on first appeal prior to its decision are omitted in the exhibit to the petition. The only exception are the pleadings and Petitioner's so-called Special Appearance and ruling thereon. This omission is patent from the petition and the exhibit showing the two opinions of the Nebraska Supreme Court on the respective appeals (Rec. pp. 300, 322), and from Petitioner's brief, wherein he mentions rulings had on the first trial and appeal.

All questions Petitioner seeks to have reviewed are questions settled in the state court by the first appeal—except the one question of substitution of defendant Davis, Agent of the Government, taken up later.

The Supreme Court of Nebraska from an analysis of the evidence found sufficient facts to prove Petitioner guilty of "palpable negligence;" that Respondent was injured in interstate commerce; that he did not assume the risk. It further found that Petitioner's special appearance objecting to venue of the action was not reviewable for non-compliance with established rules of practice and procedure.

Without the record below this Court has not the means of ascertaining whether the conclusions reached by the Supreme Court of Nebraska in regard to the case being governed by the Federal Employer's Liability Act were wrong; whether Petitioner waived right of review of any or all of these questions; whether a Federal right was insisted upon by Petitioner; whether waived by his action or non-action; whether any specific assertion of Federal right was made separate from a general claim of "insufficiency of evidence," or even that objection was made; whether, in short, it is a case over which this Court has jurisdiction.

This Court, in adopting the rule quoted above, layed down a condition precedent to be complied with before a writ of certiorari would be granted. It is held as a general rule of law that non-compliance with requirements (statutory or by rule of court) as to exhibits to be attached to petition will invalidate the application. 11 C. J. 153; 11 C. J. 148.

Various state courts have held a like rule to constitute such condition precedent. Accordingly the Supreme Court of Louisiana refused to consider an application where copy

of opinion of the Court of Appeals was not annexed to the petition as required by its rules. *Brown Shoe Co. v. Hill*, 51 La. Ann. 920, 25 So. 634. In *Montana State v. Second Judicial District Court*, 26 Mont. 224, 79 Pac. 114, the Court denied a writ of certiorari for non-compliance with its rule that a copy of the order complained of be attached to the petition. In *Ex rel Pedigo v. Robertson*, 181 S. W. 987, the Supreme Court of Missouri dismissed a writ of certiorari where its rule that opinion of the Court of Appeals as well as its entries and judgment be set forth in the application was not complied with.

The violation was premeditated and with a purpose as will be hereinafter disclosed.

#### **b. The Petition Is Not in Proper Form.**

Section 3 of Rule 37 of this Court further provides:

"\* \* \* The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition."

A like requirement was interpreted in *Sigafus vs. Porter*, 85 Fed. 689, to mean fundamental and not evidentiary facts. Petitioner has so vaguely and indefinitely pleaded evidence and cited authorities and injected so many points not previously specifically claimed on a Federal right that it is difficult to perceive his propositions. *Central Vermont R. Co. v. White*, 59 L. Ed. 1433.

#### **c. Jurisdictional Facts Not Alleged.**

The petition nowhere alleges the judgment sought to

be reviewed to have been either (1) final or (2) to have been rendered by the highest court of the State. This court can review by certiorari only "final judgments" rendered by the "highest court of a state in which a decision in the state court be had." Jud. Code, Sec. 237, as amended, Act Dec. 23, 1914, c. 2, and Act Sept. 6, 1916, c. 448, sec. 2. That jurisdictional facts must be alleged is elementary.

## II.

### DECISION ON VENUE OF ACTION NOT REVIEWABLE.

Complaint is made by Petitioner that the Supreme Court of Nebraska refused to sustain a so-called special appearance objecting to the venue of the action. We will first show this objection not to be reviewable because (a) foreclosed by prior decisions of this Court and (b) that the decision was based upon non-Federal grounds.

#### a. Foreclosed by Prior Decisions.

The mere fact that this question of venue arises under the Transportation Act raises no new question. It is controlled by the same considerations as stated in *United States v. Hvoslef*, 237 U. S. 1, 59 L. Ed. 813, wherein the Government consented to be sued for recovery of stamp taxes wrongfully collected, but provided action should be instituted *in the county wherein plaintiff resided*. The Court held:

\* \* \* "The requirement as to the particular district within which the suit should be brought was but a model and formal one, which could be waived." \* \* \*

This principal is likewise thoroughly established in the following additional cases:



Thames v. Mersey M. Ins. Co. v. United States,  
59 L. Ed. 821, 237 U. S. 22;

Fitzgerald & Mallory Con. Co. v. Fitzgerald, 52  
L. Ed. 904;

Western Loan & S. Co. v. Butte & B. C. Min. Co.,  
210 U. S. 368, 52 L. Ed. 1101;

St. L. & S. F. R. Co. v. McBride, 141 U. S. 127,  
35 L. Ed. 659;

Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217,  
40 L. Ed. 401;

In re Moore, 209 U. S. 490, 52 L. Ed. 904.

The law that objection to venue can be waived has been "so explicitly foreclosed by these prior decisions of this Court that it is no longer open for argument." Therefore, cannot be made the basis for a writ of certiorari under authority of *Leonard v. Vicksburg S. & R. Co.*, 198 U. S. 416, 49 L. Ed. 1108; *Mples. St. P. & S. S. M. R. Co. v. Merrick Co.*, 254 U. S. 376, 65 L. Ed. 312; *Mo. Pac. R. Co. v. Orzo Castle*, 244 U. S. 541, 56 L. Ed. 875. Besides this question of waiver is a question of general law as shown in the following particular.

The manner in which it may be waived is a question of practice governed by State procedure.

Roberts, "Federal Liability of Carriers," Vol. 1,  
p. 733, Sec. 427;

Richey, "Federal Employer's Liability" (2nd Ed.),  
Para. 123;

Second Employer's Liability Cases, 223 U. S. 1,  
56 L. Ed. 327;

Central Vt. R. Co. v. White, 238 U. S. 507, 59 L.  
Ed. 1433;

Kansas Cy. West. R. Co. v. McAdow, 240 U. S. 51,  
60 L. Ed. 520, 522;

Mahr v. U. P. Co., 140 Fed. 921;  
State v. Grimm, 239 Mo. 135.

As hereinafter shown the State Court held the objection had been waived.

**b. Decision Based on Non-Federal Grounds.**

The question in sequence is, what of its disposition under Nebraska practice?

The Court in its opinion on second appeal in commenting stated that under its practice a request for a decision upon its power to consider cases of this class was too broad for a special appearance objecting to jurisdiction over the person. Such a broad special appearance invoking so much, constituted a waiver of objection to jurisdiction over the person or a waiver of the privilege of choosing venue. In addition, the court in this opinion called attention to Petitioner's failure to offer evidence in support of his special appearance adopted as his chosen form of attack; to his failure to object during the trial to jurisdiction over the person and his failure to file a motion for rehearing.

This action of the Court under all circumstances was not a decision of a Federal question, but one of general principles of law, viz: waiver. It was a non-Federal question, because it was a state practice decision and that decision was on whether or not certain facts constituted a waiver, under Nebraska practice. No record of the former trial of this case being presented the *evidence* of waiver is suppressed. Therefore, the opinion ought not be impunged in any respect.

The question decided was not the denial of any Federal right asserted. It is not asserted if waived, because a waiver is a withdrawal. No such privilege was properly and specifically insisted upon to be denied. In fact the Court merely discussed these questions as related. Its real or most pronounced decision was that these things were all foreclosed in the previous trial and appeal and then the Court said:

"No motion for a rehearing was made in this court after the filing of the former opinion in this case, and the former decision of the court has become the law of the case."

In no wise did the Court ever attempt to interpret General Order No. 18-A or any other Federal rule or statute. Petitioner never did specially point out and claim any Federal privilege other than the first special appearance overruled because of failure to sustain the same with evidence which was abandoned by Petitioner. There was no denial upon that score.

The Supreme Court in its opinion on first appeal (Rec. p. 322) refused to consider this objection for the reason:

"Defendant filed a special appearance objecting to the jurisdiction of the Court over the person of defendant and *over the subject-matter of the action*, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was

again urged in the answer, and, by brief filed out of time by leave of Court, it is sought to be urged now. *But no cross-appeal* from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. See subdivision (b) of rule 18 of this court, 172 N. W."

This decision was not upon a Federal question but clearly upon an established rule of practice. This Court passed upon this question in *Tripp v. The Santa Rosa St. Ry. Co.*, 144 U. S. 126, 36 L. Ed. 371, and so decided. Nor was it a special rule of practice made and invoked in an attempt to evade the decision of this question, but was a long established printed rule of practice. By it no "right, privilege or immunity" claimed under a statute of the United States "especially set up and claimed" was denied. Petitioner simply ignored the rule, pointing out the manner of procedure. He failed to make a claim. The Supreme Court of Nebraska refused to permit a violation of one of its rules by permitting this question to be injected into the case at that belated time.

Nor, as above stated, were any Federal questions discussed, involved or decided on second appeal. The Court confined its discussion to the fact that under Nebraska practice an instrument which includes with an objection to jurisdiction over the person a request for a ruling as to the Court's jurisdiction over the subject-matter was too broad for a special appearance,—that it constituted a general appearance and a waiver of objection as to jurisdiction over the person and venue. In addition the Court called attention to other waivers made by Petitioner's failure to offer *any proof* in support of his claim that Respondent was not a resident of Douglas County, Nebraska; by his failure to

object during trial to the Court's jurisdiction over his person, although he may have moved for dismissals on the general grounds that no negligence was shown, which is not a specific claim of Federal right; and by his failure to file a motion for a rehearing on first appeal. The court's decision on this point, however, is embraced in the following language:

"No motion for a rehearing was made in this court after the filing of the former opinion in this case, and the former decision of the court has become the law of the case.

Such decision and discussion was not upon a Federal question, but upon general principles of law and state practice, viz: waiver. Under authority of *Atlantic C. L. R. Co. v. Mims*, 37 Sup. Ct. Rep. 188, 242 U. S. 532, 61 L. Ed. 476, this Court has no jurisdiction to review:

" \* \* \* To become the basis of a proceeding in error from this court to the supreme court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, chap. 231, Comp. State. 1913, Sec. 1214). This means that the claim must be asserted at the proper time, and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (*Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), and upon the question whether or not such a claim has been so asserted the decision of the court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right. *Central Vermont*

R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; Erie R. Co. v. Purdy, 185 U. S. 148; 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137;

“ \* \* \* While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which \* \* \* this court can review (Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149; 17 Sup. Ct. Rep. 709), and therefore, for want of jurisdiction, the writ of error is dismissed.”

No record of the first trial of this case being contained in Petitioner's exhibit to his petition the waivers found therein by the Supreme Court of Nebraska must be deemed to exist, and the objection waived. A question waived in a State court will not be reviewed here.

Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. ed. 273;

Tripp v. Santa Rosa St. Ry. Co., 144 U. S. 26, 36 L. ed. 371.

## III.

**SUBSTITUTION OF PARTY DEFENDANT CURED BY WINSLOW ACT.**

As stated by Petitioner on page 6 of his Petition the action was commenced January 9, 1920, when Walker D. Hines was Director General of Railroads. Thereafter through successive changes related, James C. Davis became Federal Agent under the Transportation Act. On May 31, 1922, the court upon Respondent's motion, substituted Mr. Davis as defendant.

Whatever error may have existed is now cured by the provisions of the Winslow Act, which passed the House of Representatives February 19, 1923, the Senate March 2, 1923 and was approved by the President March 3, 1923; this Act amended Section 206 of the Transportation Act, 1920, by adding at the end thereof two new subdivisions reading as follows, viz:

“(h) Actions, suits, proceedings, reparation claims, of the character described in subdivision (a), (c) or (d) properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the act entitled ‘An Act to prevent the abatement of certain actions,’ approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. Nor shall any action, suit or other proceeding hereto-



fore or hereafter brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal court control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

“(i) Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect.”

There is, therefore, no question involved in this assignment for review in this court.

#### IV.

### TRIAL QUESTIONS UNDER LIABILITY ACT.

Having disposed of all other questions we come next to a consideration of the questions of sufficiency of evidence to show Respondent to have been injured by Petitioner's negligence while engaged in interstate commerce and to have not assumed the risk; we will first show (a) that the

right of review of these questions has been waived and (b), that they are so wholly without color of merit for various reasons as to afford no basis for the issuing of the writ.

**a. Right to Review Waived.**

As before stated these questions were settled on first appeal of this action, as shown by the two opinions (Rec. p. 300, 322). Petitioner did not file a motion for rehearing.

Section D, Rule 8, of the Supreme Court of Nebraska (page viii, 172 N. W.) provides:

“All motions for rehearing \* \* \* *may be filed as of course* at any time within 40 days from the filing of the opinion of rendition of the judgment \* \* \*

The right to file a motion for rehearing is absolute and a matter of *right*—not, as in Federal courts, a matter of *discretion*.

Rule 9 of said Court provides that *no mandate will issue* during such period of time, or, in event the motion be granted, pending consideration thereof. The effect of these provisions is to (1) inform the parties of the court's opinion of the matters involved and, (2) grants the parties 40 days within which to correct any claimed error before the decision is enforced.

Therefore, in the event a party believes the decision to be erroneous in whole or in part, an adequate remedy is afforded him to correct any claimed error therein and the Supreme Court retains jurisdiction for 40 days that this may be accomplished.

Under Nebraska practice a litigant is required to take advantage of this remedy and to point out any alleged error in the decision by motion for rehearing. If he permits the judgment to become final for lack of such motion he is estopped from thereafter contending the decision erroneous. This is also a question of settled Nebraska practice.

"If our former conclusion was erroneous, the defendant *should have* obtained a correction of the error by presenting a motion for rehearing . . ." *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349.

"(Where) *No motion for a rehearing was filed, nor* \* \* \* *any objection made to the decision of the court . . .* the questions will not be again considered . . ." *O'Donahue v. Hendrix*, 17 Neb. 287.

Indeed, this Court has recognized this requirement of State Court practice of asking for a rehearing if not satisfied with the decision of a court on first appeal or when desiring a modification of the mandate.

*Rio Grande Western R. Co. v. Stringham*, 60 L. ed. 136, 239 U. S. 44.

*Norfolk S. & R. Co. v. Ferebee*, 238 U. S. 270, 59 L. ed. 1303.

The decision on first appeal was permitted to become final by Petitioner without one word of protest, without any suggestion to the Court that Petitioner claimed a Federal right specifically set up and claimed by him was being denied him—or, in fact, that any right was being denied him. There is a vast distinction between a decision which becomes final after an exhaustion of remedies afforded and one which becomes final because of the laches of a party.

In the first class the decision becomes final *over the protest* of the unsuccessful party and in spite of all he can do and in the second class its finality, as a decree binding upon him, is accomplished by reason of his non-action or consent. Petitioner was apparently satisfied that a Federal right had not been denied by the first appeal and apparently satisfied with the opinion. The conduct under Nebraska practice is a waiver and was so held to be a waiver under our practice.

Petitioner was bound to try his action in accordance with the established practice in Nebraska and to fully pursue the remedies it afforded him. He had failed to ask a reconsideration of those findings. He cannot ignore the machinery the state court afforded him to obtain relief by circumventing positive right of review. He became estopped from denying this accepted order. He will not be permitted to take the attitude of saying to a state court "You have erred, but I will not follow your procedure and have you correct it, but will leave the error uncorrected. I will obtain its correction in the Supreme Court of the United States."

Relief being available to him in the original proceedings this Court will not hear him. The law is stated in note to *Wulzen vs. Board of Supervisors*, 40 A. S. R. 17 (loc. note, p. 30):

"It follows from the rule that certiorari issues only when there is no adequate remedy at law that among the questions which cannot be presented by it, where this rule prevails, are included all those which in the particular case might have been reviewed by appeal, writ of error, *motion for new trial*, or other

*appropriate proceeding of which the party might have availed himself either in the appellate court or in the court in which the action against him was taken, provided such court had jurisdiction of him and of the subject-matter of the action or proceeding; nor can he maintain his claim to the writ on the ground that the time within which he might have appealed, or otherwise sought redress has expired, unless, perhaps, where he can show that his failure to avail himself of the remedy which he might have pursued was not due to any negligence or fault on his part. (Citing many cases)."*

In *People v. Pilot Commissioners*, 37 Barb. (N. Y.) 126, the court applied this common law rule to failure to request rehearing.

The Supreme Court of Louisiana adopted this common law rule as a rule of court and in at least the three following cases the failure of the Petitioner to request a rehearing in the court below was decreed fatal to the granting of the writ.

*Colomb vs. Rolling*, 106 La. 37, 30 So. 293;

*In re Huddleston*, 106 La. 594, 31 So. 147;

*Frellsen vs. Ruddock Cypress Co.*, 108 La. 37, 32 So. 169;

Nor will the assumption be indulged that the Supreme Court of Nebraska would not have corrected error if such error existed:

" . . . We cannot assume that that body will necessarily adhere to their previous decision; but on the contrary must assume that if that body is convinced, on a rehearing, that the former decision was erroneous

either upon the facts or the law, it will promptly reverse its decision . . . " *People v. Pilot Com'rs.* 37 Barb. (N. Y.) 126.

Relief being *available* but not insisted upon in the original proceedings this court will not take jurisdiction of this action.

If follows that any objection that Petitioner may have had to the decision of the court on first appeal was waived by his failure to avail himself of relief in the original proceedings by motion for rehearing. And a question waived in the state court will not be reviewed here.

*Richmond Min. Co. vs. Rose*, 114 U. S. 576, 29 L. ed. 273;

*Tripp vs. Santa Rosa St. Ry. Co.*, 144 U. S. 26, 36 L. ed. 371.

#### **b. Questions Wholly Without Merit For Various Reasons.**

In addition to these questions having been waived by failure to file motion for rehearing as hereinbefore shown they are so wholly without even color of merit as to raise no question. Insofar as the question of whether or not Respondent was injured in interstate commerce is concerned this question has been so "explicitly foreclosed by prior decisions as to afford no basis for the writ." The questions of negligence, assumption of risk and instructions are questions that are determined by broad principles of general law. They involve no construction of Federal Statutes. The Federal Employer's Liability Act does not attempt to define negligence but leaves it to be determined according to the rules of practice and procedure of the various state courts in accordance with the principles of general law.

We shall now proceed to show (1) that the question of whether Respondent was in interstate commerce has been "explicitly foreclosed by prior decisions" and then, (2) proceed to show the utter lack of even color of merit in the remaining questions.

(1) *Interstate Commerce Question Closed by Prior Decisions of This Court.*

Respondent was injured while preparing a cable sling for gantry crane to enable it to be continued in its use for handling load of telephone poles and similar loads. Such preparatory act was within interstate commerce.

North Car. R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591;

So. R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321;

Louis. & Nash R. Co. v. Parker, 242 U. S. 13, 61 L. ed. 119.

The telephone poles were moving in interstate commerce from St. Paul, Minnesota, to St. Edwards, Nebraska; the poles had shifted so as to need readjustment. The sling was to be placed about the poles to permit the gantry crane to elevate and adjust them on their car and hence permit their continued movement in interstate commerce. Such act was necessary to their continued movement—hence an act in interstate commerce.

*So. R. R. Co. vs. Puckett, supra;*

*Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. ed. 363.

Slings are necessary equipment of the gantry crane. Without them the gantry cannot be used. A hook, attached



to another cable which, in turn, is attached to the elevating machinery of gantry, is slipped into the sling. If the load is merely out of adjustment it is properly adjusted on its present car. If the car be in bad order the load is transferred into a good order car. These slings are made of rope, chains and cables and used according to their adaptability to the materials to be handled. For instance, cable slings are preferable in handling wood objects (Ques. 810) such as telegraph poles. Now slings are constantly being needed, hence a supply of rope was kept on hand for making rope slings (Ques. 878, 879) and cable to make cable slings (Ques. 908) as well as other materials for supplying worn out parts of gantry (Ques. 882). The gantry crew made these repairs.

Respondent was injured while preparing a cable sling to take the place of one previously in use (Ques. 887). The sling at the time of the injury was actually attached to the gantry. The act being performed was, then, more than being *preparatory*, one of *present repair* to the going gantry—an operating interstate instrumentality. As much so as the supplying of a new cog-wheel to its running machinery, or the putting of a draw bar in a car of a train in transit. *Walsh v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1. It is like putting a new bolt into an interstate bridge in use. *Pederson v. Del. & Lac. Ry. Co.*, 229 U. S. 146, 57 L. ed. 1125.

Had Respondent been injured by negligence attributable to Petitioner while Respondent was merely at his place of employment he would be entitled to recover. Respondent's duties were exclusively confined to those connected with the use of the gantry—an interstate instrumentality.

He was required to be there during certain hours—was not permitted to leave. If no cars were immediately available he was required to await their arrival. “He was none the less on duty when waiting. His duty was to stand and wait.” *M. K. & T. Ry. Co. v. U. S.*, 231 U. S. 112, 58 L. ed. 144; *Johnson v. So. Pac. R. Co.*, 196 U. S. 1, 49 L. ed. 363.

(2) *No Color of Merit.*

While the question of whether plaintiff was injured in interstate commerce has been (immediately supra) specially treated, because so specifically foreclosed by prior decisions of this court, yet it is also not to be considered for other reasons. The foregoing question as well as the questions of whether plaintiff was guilty of negligence, whether Respondent assumed the risk and the instructions to the jury are wholly without even color of merit. The broad principles found in the following excerpts apply to all these elements with equal force. We again call the Court's attention to the fact that the determination of negligence and assumption of risk are not defined in the Employer's Liability Act but they are jury questions to be determined under general principles of law.

The Court's attention is directed to the following extracts of complaints similar in a general way to those of Petitioner upon trials had under procedure recognizing all provisions of the Federal Employers' Liability Act. We believe that in all cases where a petition in error would be dismissed for lack of merit a writ of certiorari will be denied.

"The case, then, is one in which there is no question as to the interpretation of any provision of the Federal act, or as to the definition of legal principle in its application, *but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable.* The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. *Seaboard A. L. R. Co. v. Padgett*, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; *Seaboard A. L. R. Co. v. Koennecke*, 239 U. S. 352, 355, ante, 324, 327, 36 Sup. Ct. Rep. 126. Judgment affirmed." *Great Northern R. Co. v. Knapp*, 60 L. ed. 751.

"Its tendencies involving no matter of doctrinal importance, for this reason and additionally in view of the fact that both the courts below have concurred in holding that there was not sufficient ground to take the case from the jury, we think it is unnecessary to state the proof and its tendencies, and we therefore content ourselves with saying that the contention that error was committed *in not taking the case from the jury is found, after an examination of the record, to be without merit.*

"In the argument a contention was urged based upon some expression made use of by the trial court in refusing the request to take the case from the jury. Although we have considered the proposition and find it *totally devoid of merit*, we do not stop to further state the contention or the reasons which control us concerning it as we think it is manifestly and after-

thought, as it was *virtually* not raised in the trial court, and was not *included in the assignments of error made for the purpose of review by the court below*, nor in those made in this court on the suing out of the writ of error." *Seaboard Air Line Ry. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777.

"As to other questions of Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charges to the jury as given. The trial court charged that, in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the supreme court of the state rightly affirmed the judgment in that respect. \* \* \* (citations.)

"The court properly refused the request as to contributory negligence and gave the rule laid down in the employers' liability act. As to assumption of risk, the supreme court held that no such issue was made or submitted to the trial court (a conclusion fully supported by the record), and therefore under the state practice no question concerning that subject was presented on appeal. This conclusion denied no right of a Federal character. Judgment affirmed." *So. Ry. Co.*

\* \* \* "5. The refusal of a state trial court, *sustained by the state court of last resort*, to take from the jury an action under the Federal employers' lia-

bility act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sect. 8657), by directing a verdict for defendant, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous." \* \* \*

"2. Questions in a suit under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sect. 8658), which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts involving no construction of the Federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court." \* \* \*

"7. Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the railway company to show that, under the Federal law, all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right. Those assignments, therefore, under Judicial Code, sect. 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, sect. 1214), Rev. Stat. sect. 729, will not be reviewed on a writ of error to a state court. *Seaboard Air Line R. Co. v. Duvall*. See also *Chicago Junction R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, and *Yazoo & M. Valley R. Co. v. Wright*, 235 U. S. 376, ante, 277, 35 Sup. Ct. Rep. 130, which state the rule where similar cases are brought here by writ of error to a Federal court.

"Judgment affirmed." *Central Vermont R. Co. v. White*, 59 L. ed. 1433.

\* \* \* "Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong.

"Judgment affirmed." *Louisville & N. R. Co. v. Stewart*, 60 L. ed. 989.

As shown by the opinion of the Supreme Court of Nebraska on first appeal (Rec. p. 326) it is related that, the crew were instructed by its foreman to bind the jagged ends of the cable with cloth; no cloth or wire was available in the tool house; the foreman instructed the crew to find some; one of Respondent's fellow workmen found a piece of wire in an empty coal car; this wire had a metal cylinder (detonator) thereon; he attempted to twist this cylinder off and in so doing powder substance spilled out of it; the thought of an explosive suggested itself to him—a fire-cracker. With these suggestions and evidences of danger he gave it no inspection, but merely exhibited it to the foreman who directed its use. A portion of the wire he cut off with a hammer, giving the balance—with no warning—to a mere boy of 18, who proceeded to straighten it to use in binding the cloth on the cable.

Respondent had no knowledge of the wire's having been obtained from a coal car, of the yellow powder; that no inspection had been given it. But he, a mere boy of 18 years, relying upon its being given him by an older and more experienced workman and his foreman's direction to use it he attempted to straighten the wire that the fellow-servant had crumpled and in so doing the cylinder exploded and his eyes were blinded.

The duties of the master to furnish safe materials and,

as a necessary corollary, to properly inspect and test these materials, is too well established to need citation. The conclusion reached by the Supreme Court of Nebraska that Petitioner was guilty of "palpable negligence" and that Respondent had not assumed the risk are so firmly established as to be "explicitly foreclosed by former decisions."

The Supreme Court of the United States has held they would not disturb such a decision unless there was "palpable error." The Supreme Court of this State on these facts held there was "palpable negligence." This is absolutely no open question on the merits. All had been adjudicated on the first appeal and nothing is worthy of this Court's consideration. The writ should be denied.

*(Alleged error in instructions without color of merit.)*

Petitioner's claim of error concerning the instructions, as appears on pages 31 and 32 of his brief, is that issues as to negligence were submitted to the jury with no proof to support them. The utter lack of even color of merit in such contention is readily apparent.

Instructions Nos. 1, 2 and 3, respectively informed the jury of the allegations of the petition, answer and reply respectively,—a statement of the issues raised by the pleadings as required by Nebraska practice. *Home Savings Bank of Stewart*, 78 Neb. 624, 110 N. W. 947.

Instruction No. 4 told the jury to find for Respondent provided he established the propositions he alleged, but if he failed to establish "any or all" of such propositions the verdict should be for Petitioner.



All reference as to negligence on part of Petitioner appears in the following excerpt from Instruction No. 1:

"Plaintiff further alleges that the defendant neglected to provide wire and tools proper to operate or repair said machinery, and that the foreman in charge told his subordinates to provide wire for such work; that one of defendant's agents found wire in an empty coal car and brought it to the foreman who directed its use by his subordinates, without carefully examining the same and that he failed to see and know its dangerous condition; that there was a metal cylinder on said wire containing an explosive, not known to plaintiff, and which wire and cylinder was negligently given plaintiff by defendant's employee." \* \* \*

This instruction told the jury that Respondent *claimed* Petitioner undertook a repair *without having on hand sufficient and proper materials therefor*—it described a situation. That with this scanty situation and because thereof Petitioner then directed materials be found to supply the same and, accordingly, one of the employees did find a wire in an empty coal car. This spurious wire so found had thereto a metal cylinder containing an explosive. Petitioner, without any inspection thereof, directed its use and it was given Respondent.

Proof of such elements, in addition to the findings of the Supreme Court of Nebraska, is affirmatively shown by Petitioner's brief. On page 19 thereof appears the following from his abstract of plaintiff's testimony:

(After narrating Foreman ~~Tanner's~~ order to bind a cloth about the jagged ends of the cable, and his

statement that they must have some wire to fasten the cloth on.)

“There was no suitable wire in the tool house and this fact was reported to Foreman Turner and ‘He said to see if we could find some.’ This order was given ‘to the gang’ (Rec. p. 79, Qs. 60 to 65). ‘My uncle \* \* \* found some wire in the empty coal car. I did not know where he got it from at that time.’ He brought the wire up to ‘where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful of it or there would not be enough of it to do the work with.’”

Similar statements appear in Petitioner’s abstract of testimony appearing upon pages 18 to 25 of Petitioner’s brief, showing there was no serious dispute upon the facts stated in the instructions but that Petitioner as the Supreme Court of Nebraska stated in its opinion (Rec. p. 323) relied upon the theory that Respondent when injured was merely “satisfying his idle curiosity.” Petitioner’s contention was without support in the testimony, as shown by his abstract. Even if it had been supported by inference of counsel it was also clearly disputed, raising an issueable fact which the jury resolved against Petitioner.

It clearly appears from the foregoing that there was abundant evidence on the questions of negligence and assumption of risk to be submitted to the jury and likewise ample evidence to support the claimed acts of omission and commission recited in the instruction as constituting negligence on the part of Petitioner. So much evidence in fact that petitioner’s statement that there was *no* evidence in support thereof is wholly without color of merit, and such

statement cannot be made the basis for the issuance of a writ of certiorari.

“The bare averment of a Federal question is not sufficient, there must be at least color of ground for such averment.”

*Hamlin vs. Western Land Co.*, 174 U. S. 531; 37 L. ed. 267.

There was ample evidence of acts on the part of Petitioner which if resolved against him by the jury would constitute negligence—in fact the Supreme Court of Nebraska reached the conclusion that Petitioner was guilty of “palpable negligence.” It is apparent therefore that what Petitioner seeks is that this Court decide the issues of fact—whether Respondent was injured as he and the other witnesses testified, or whether he was injured in the manner *inferred* by Petitioner. This Court has often decided that it is not a Court of general review of issues of facts on appeals from State Court. *Louisville & N. R. Co. vs. Stewart*, 60 L. ed. 989.

We respectfully submit the writ of certiorari should be denied.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

October Term, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER  
SECTION 206 OF THE TRANSPORTATION  
ACT 1920, PETITIONER,

V.

JOHN O'HARA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF NEBRASKA.

**BRIEF OF RESPONDENT.**

JOHN O. YEISER,  
JOHN C. TRAVIS,  
*Attorneys for Respondent.*  
BENJAMIN S. BAKER,  
*Of Counsel.*



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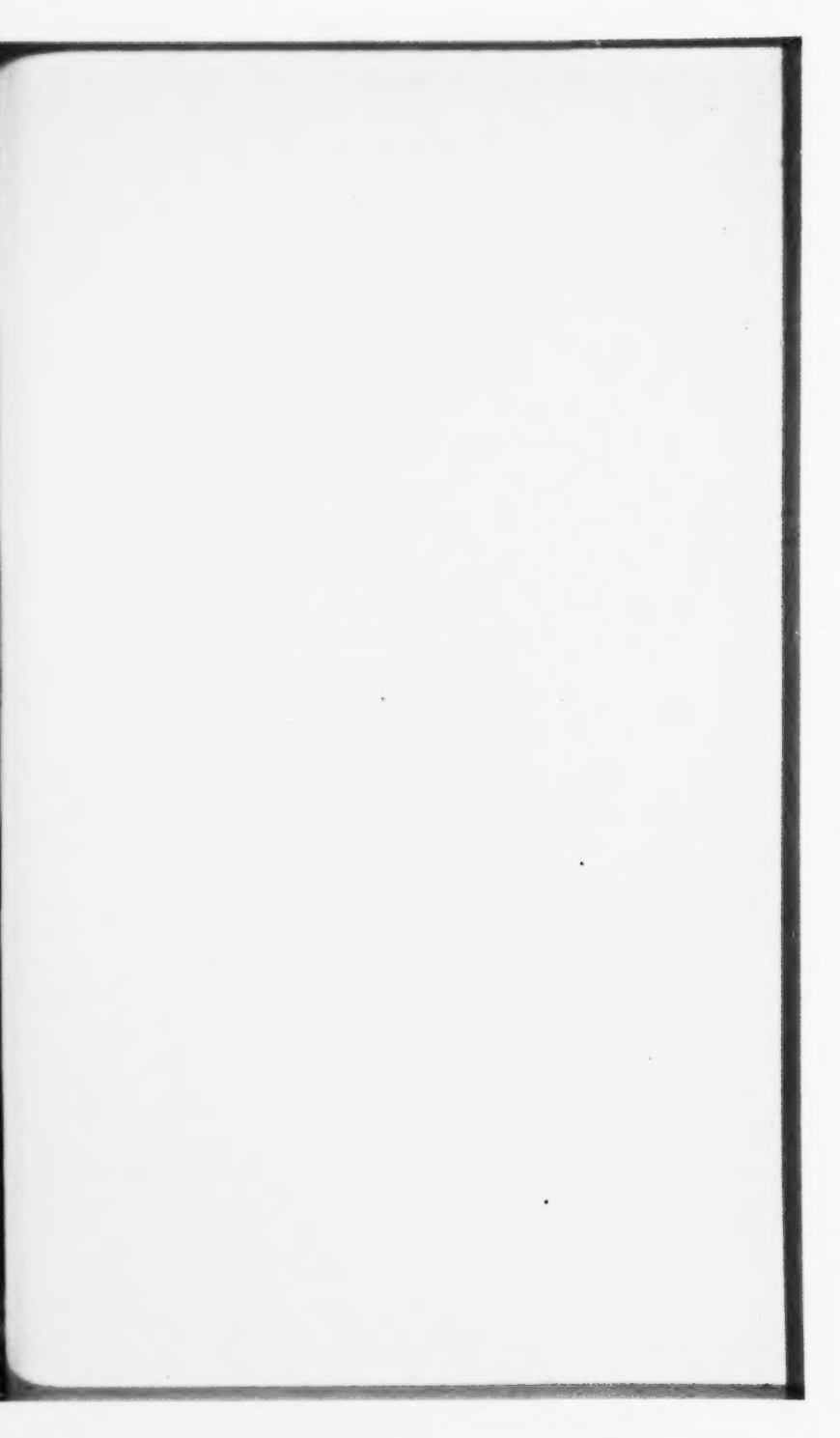


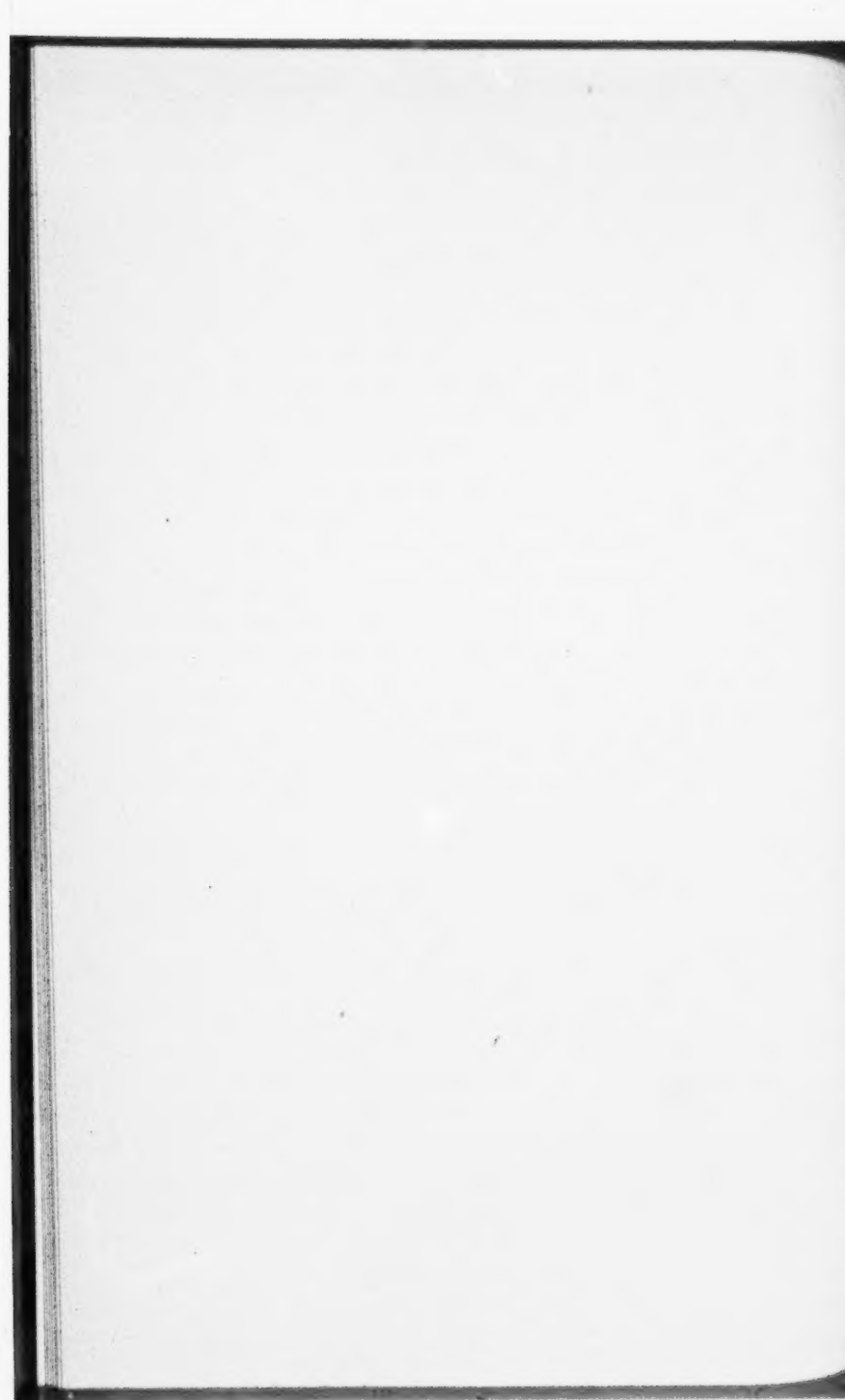
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Number 326.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

---

October Term, 1923.

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JAMES C. DAVIS, AGENT OF THE PRESIDENT UNDER  
SECTION 206 OF THE TRANSPORTATION  
ACT 1920, PETITIONER,

V.

JOHN O'HARA, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF NEBRASKA.

---

**BRIEF OF RESPONDENT.**

---

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*Of Counsel.*

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**STATEMENT CORRECTIONS.**

It is a fundamental rule of law that, in reviewing sufficiency of evidence to constitute a cause of action on motion to direct

a verdict every controverted question must be resolved in favor of plaintiff and he be given the benefit of every inference that reasonably can be deduced from the facts in evidence.

Notwithstanding this rule of law, petitioner, occupying that position, presents to this court a statement wherein every controverted question of fact is resolved to the contrary in petitioner's favor. In fact, he has gone further and indulged in inferences—some of which are based wholly upon mental operations and thoughts of witnesses and some not even on that much foundation, but are contrary to the evidence.

Petitioner's offense in this respect in stating the case is so general that to attempt to straighten out the story would be more involved and confusing and take more space than to restate the story.

The action is brought under the Federal Employer's Liability Act for damages growing out of the explosion of a detonator (blasting cap) in which respondent lost his sight.

John O'Hara, respondent herein, a boy of eighteen years (Rec. 45, Q. 101), was employed by the Petitioner as a member of the "gantry" crew (Rec. 53, Q. 228-229; Rec. 44, Q. 89). This "gantry" is a huge derrick crane of which Exhibits 4 and 5 (Rec. 52) are good pictures (Rec. 54, Q. 237-238). It straddles two sets of parallel tracks (Rec. 52, Q. 20-23) and itself sets upon rails which are about two feet high (Rec. 54, Q. 245-247). It is used to transfer the contents of bad order cars en transit to good order cars (Rec. 40, Q. 23; Rec. 61, Q. 372), or, in event the car is in good order but the load shifted and in need of adjustment, to adjust such loads (Rec. 61, Q. 374), such as tractors, automobiles, engines, guns, etc. (Rec. 61, Q. 376-377).

While it may be occasionally used for intrastate shipments (no record of any such) still it is used regularly for interstate shipments (Ans. Rec. p. 17, Rec. 61, Q. 380).

The operation is to place the bad order car on one of the parallel tracks and alongside a car in good order. Slings are placed about the shipment, hooked from the gantry hoist, and operated so the load is raised clear of the bad order car—run over the good order car and lowered therein (Rec. 40, Q. 21-22). Without such sling the gantry is not complete for use (Rec. 91, Q. 802-807). Dependent upon the character of the shipment, rope, cable or chain slings are used. On wooden objects, such as poles and lumber, a cable sling is used (Rec. 92, Q. 810-814).

The gantry is kept in working order by the gantry crew (Rec. 92, Q. 816) and a tool house maintained nearby where repairs such as a surplus of rope, chains and cable is kept to make and repair slings (Rec. 96, Q. 878-870, 882; Rec. 98, Q. 907-908), as well as other repair material (Rec. 96, Q. 882). These slings frequently wear out (Rec. 92, Q. 804-809).

The gantry was operated and maintained by a crew of five men, consisting of the following: Turner, foreman and gantry-operator (Rec. 53, Q. 232) and respondent, Ed. O'Hara, Charles Berg and Francis O'Hara (Rec. 53, Q. 230).

On the day of the accident the crew had transferred the contents of a car of sheet iron (Rec. 62, Q. 381) to a good order car. This sheet iron had been in a coal car (Rec. 62, Q. 393) and there was a little coal in it (Rec. 62, Q. 393). While unloading it, Ed had noticed some wire (Rec. 62, Q. 394). After it was unloaded the car remained but a short distance from the gantry (Rec. 54, Q. 254). This shipment was in transit from Black Rock, N. Y., to Tacoma, Washington (Ans. Rec. 17).

A shipment of telephone poles enroute from St. Paul, Minnesota, to St. Edwards, Nebraska, (Ans. Rec. 17), then about 300 yards away was next to be handled (Rec. 95, Q. 862-863; Rec. 96, Q. 873) and the crew proceeded to work

on it (Rec. 96, Q. 874). This was a load properly to be handled by a cable sling (Rec. 92, Q. 810-814), as chains would scar the poles (Rec. 55, Q. 263) and rope was not strong enough (Rec. 55, Q. 263). There had previously been a cable sling, but this had been broken (Rec. 189, Q. 1705; Rec. 92, Q. 810; Rec. 96, Q. 883). The foreman directed the crew (Rec. 41, Q. 36-37) as a matter of repair (Rec. 96, Q. 888) to make a sling from a piece of cable previously used on the gantry (Rec. 55, Q. 266) and kept in the tool house for such purpose (Rec. 98, Q. 908, to replace the previous cable sling as a part of, and in order to prepare, the gantry for handling the car of poles as well as future lumber loads (Rec. 92, Q. 810, 814; Rec. 189, Q. 1704; Rec. 96, Q. 887). Accordingly the cable was taken from the tool house and cut (Rec. 41, Q. 33-35), clamps put on it, and attached to the gantry (Rec. 42, Q. 50). They all busied themselves (Rec. 58, Q. 317-318; Rec. 99, Q. 921-922).

That the men would not injure their hands upon the two jagged cable ends in handling the sling the foreman directed that cloth be bound thereon (Rec. 94, Q. 846; Rec. 94, Q. 415-418; Rec. 42, Q. 59). Cloth was found. There was no binding wire in the tool house (Rec. 56, Q. 283; Rec. 92, 823-824) and this fact was reported to the foreman (Rec. 42, Q. 63; Rec. 92, Q. 823). Thereupon the foreman directed the gang to find some wire (Rec. 42, Q. 64-65; Rec. 93, Q. 826; Rec. 64, Q. 419). Ed, remembering the wire in the coal car, stated to the foreman he knew where there was a piece he thought would do—that he had seen some in the coal car (Rec. 56, Q. 287). Ed climbed in the coal car and got it (Rec. 56, Q. 288) showed it to the foreman, asked him if it would do, to which the foreman said yes, that probably they would have to be careful or there would not be enough of it to do the work with (Rec. 43, Q. 68). The foreman, when the wire was exhibited to him was not over four or six feet from Ed (Rec. 57, Q. 300; Rec. 43, Q. 69) and his directing its use with the expression as to quantity was

plainly heard by Respondent and the other workmen (Rec. 57, Q. 299; Rec. 64, Q. 420). Respondent, however, had no knowledge as the source from which the wire was procured until after the accident (Rec. 43, Q. 66-67).

This wire was about the size of an ordinary cord string. There were two pieces of wire, each about 3 or 4 feet long, with a small copper tube; cylindrical in form and about an inch long and the circumference of an ordinary pencil (Exhibit 3, Rec. 65; Rec. 65, Q. 428-433).

It is admitted, both in the answer (Rec. 17) and conceded throughout the trial that the foreman made no inspection, test or investigation in regard to the cap on the end of the wire.

Ed made an unsuccessful attempt to twist the wire from the cap; then laid the wire across a rail and cut off a portion with a hammer. While twisting, yellow powder, like flour, came out of the cap and this he spoke of after the accident but not before (Rec. 51, Q. 192-193; Rec. 65, Q. 435-439). The piece of wire cut off was used and then Ed cut a second piece off, using the same method of cutting it, with a hammer (Rec. 66, Q. 451; Rec. 67, Q. 470). In cutting the wire two straight strands were left, each about 4 or 5 inches long, plus an undetermined additional amount crumpled and twisted about the cap by Ed's twisting (Rec. 43, Q. 72; Rec. 66, Q. 452). In cutting the second portion Ed held the cap and extreme end of wire both so as to form a loop and hence neither piece fell to the ground when cut (Rec. 76, Q. 608-613). Ed made no investigation, inspection or test of the cylinder (Rec. 67, Q. 460-464) and did not know what the cap was (Rec. 69, Q. 491-492). After cutting off the second portion of wire, Ed dropped the hammer and walked some ten feet toward the cable (Rec. 67, Q. 473-477), met John and handed the remaining twisted portion of wire to him (Rec. 67, Q. 458). Respondent took it, at a point ten or twelve feet from the hammer (Rec. 68, Q. 477),

proceeded to straighten the wire, testifying (Rec. 43, Q. 73): "I thought that if they would not have enough of the wire, that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on (about 18 inches high), and I had the cylinder part in my left hand and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." The cylinder exploded when it struck the rail (Rec. 43, Q. 74), blowing Respondent's eyes out (Rec. 43, Q. 75). He had the wire less than a minute before the explosion (Rec. 45, Q. 103). His act of pulling the wire was to straighten it for use in binding the cloth on the cable (Rec. 44, Q. 84-85).

The force of explosion dented the rail so Ed could very nearly lay his little finger in it (Rec. 70, Q. 502-509). Particles flew some six feet and struck Berg (Rec. 99, Q. 933-936).

At the time of the accident but one cloth had been bound on the cable (Rec. 69, Q. 499) and there remained one to be put on (Rec. 69, Q. 450). At the time of the explosion everybody was busy working (Rec. 58, Q. 317-318). The day was hot with the sun shining (Rec. 56, Q. 290-293).

The cylinder was a "detonator" or "blasting cap" used in mines as a starter for high explosives (Rec. 121, Q. 1204), which are correctly exploded by detonation—the detonator being first exploded and in turn exploding the dynamite. The explosive in these detonators is fulminate of mercury. Bulletin No. 80, Bureau of Mines, United States government publication, says of these detonators (Rec. 79):

"In the description of mercury fulminate attention was called to its extreme sensitiveness to heat, friction, or blows, and to the extreme violence of its explosion.



All these properties therefore belong to detonators and electric detonators, and these devices should be treated with the utmost respect. Never attempt to pick out any of the composition. Do not drop them or strike them violently against any hard body. Do not lay them on the ground where they may be stepped on. Do not step on them. In crimping, take the greatest care not to squeeze the composition and never crimp with the teeth, for there is enough composition in one of these small capsules to blow a man's head open.

\* \* \* \* \*

*"When carried or shipped they should be packed firmly with a quantity of elastic material, such as felt or the coiled legs of the electric detonators, about them, and they should not be exposed to heat, blows or shocks of any kind."*

In tests detonators exploded less than two feet from a lead plate have perforated the lead plate (Rec. 128, Q. 1302) and particles of the jacket occasionally fly 20 to 30 feet (Rec. 129, Q. 1305). The explosion is very dangerous (Rec. 128, Q. 1300).

Mercury fulminate is very sensitive to shock, heat and friction (Rec. 133, Q. 1382-1383), and is the most sensitive explosive used commercially (Rec 181, Q. 1578):

### **PRELIMINARY QUESTION.**

#### **Improper Appeal and Non-Federal Questions.**

Before we take up the questions presented by Petitioner there is one point we wish to call to the attention of the court for the reason that from this suggestion the court may find it proper to affirm the decision of the court below without the necessity of going into the propositions presented by Petitioner. If the question discussed in this preliminary argument be sustained there would be no federal question left in the case.

There were two trials and two appeals to the Supreme Court of Nebraska before certified to this court.

*Petitioner* brought up for review only the judgment and second trial proceedings. The proceedings on first trial he purposely omitted as shown by affidavit of Clerk of Supreme Court of Nebraska (p. 3, motion of Respondent for quasaal and dismissal of writ of certioari) and by *Petitioner's* brief resisting Respondent's request for certiorari for first record. *Respondent* then brought up by supplemental record only portions of the first trial proceedings which show *Petitioner* to have waived the venue objection on first trial which would destroy the right to interpose such a privilege in subsequent trials.

The questions of whether Respondent was injured by *Petitioner's* negligence; whether he had assumed the risk; whether *Petitioner* was engaged in interstate commerce; whether the venue objection was waived by failure to cross-appeal were all finally determined on first appeal.

On the second appeal of this action *Petitioner* sought to review these same holdings adjudicated on first appeal. The Supreme Court of Nebraska refused to permit a review of these settled questions, holding that such review should have been sought upon motion for rehearing at the time of the first appeal; that the questions had become *res adjudicata* and the law of the case. No new or different decision was rendered on second appeal upon any of these questions nor were they considered nor mentioned other than to apply the rule, *law of the case*.

A single exception exists to this statement and that is in reference to the venue question. This was discussed from several different angles and several specific waivers of the objection noted. The Supreme Court of Nebraska disposed of the question upon the specific grounds that the former opinion, holding this question to have been foreclosed by

failure to cross-appeal, *was also settled under the law of the case* (Rec. p. 202).

Insofar, then, as all questions arising on *first trial* and disposed of on first appeal are concerned they are not proper questions and especially to review in this court under the second trial records procured by Petitioner. Without having obtained a writ of certiorari to review the first trial or any rulings therein, but confining himself to the last trial, Petitioner asks this court to hold that all the findings of the Supreme Court of Nebraska on the *first appeal were erroneous*. Petitioner asks the court to base its review of first trial questions—not on the first trial proceedings—but *upon those of the second trial*. Petitioner's position is a very novel one. How can this court say that the record of evidence on first appeal does not show Petitioner to have been guilty—as found by the Supreme Court of Nebraska—of “culpable negligence?” How can this court say that the first trial record did not show Respondent to have been engaged in interstate commerce and to not have assumed the risk? How can this court say that the Supreme Court of Nebraska erred in its holding that Petitioner failed to perfect a cross-appeal upon the venue question and that by reason thereof waived such objection even if properly made?

Another thing of great importance faces Petitioner. That is the decision on second appeal merely applying the rule *law of the case* to these questions *was not the decision of any federal question*. This was a decision upon a non-federal ground—one of general practice.

We will now treat the matter above discussed by analysis.

(a) *Proceedings on first trial and appeal not reviewable because not appealed from.*

The decision upon these questions upon first appeal was final within the meaning of Section 237 of the Judicial Code. A review of these points decided on first appeal can be had only by a review of the first trial proceedings. *Rio Grande*

*Western Ry. Co. v. Stringham*, 60 L. Ed. 136. This authority not only decides this point, but the two points following, *infra*. We, therefore, reserve quotation here to eliminate repetition.

(b) *The decision on second appeal applying the rule law of the case was a decision based upon non-federal ground and therefore not reviewable here.*

This point, as stated, was likewise decided in the *Stringham case, supra*, and also in the case of *Northern Pacific R. R. So. v. Ellis*, 36 L. Ed. 504.

(c) *The proper and exclusive method of reviewing the decision on first appeal was by motion for rehearing, as a foundation for further appeal.*

A rehearing cannot be had as a part of the second appeal, nor, indeed, at any time after the first appeal decision becomes final and mandate issues. This is established by a long line of authorities. We will set out excerpts from two of these authorities and cite additional ones in support thereof.

In *No. Pac. Ry. Co. v. Ellis*, 144 U. S. 458, this court reviewed the following holding of the Supreme Court of Wisconsin on second appeal:

"But the decision of this court upon a demurrer upon the questions properly involved (on first appeal) cannot be reviewed by the circuit court, nor, indeed, by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and, as between the parties to that litigation, for all time. This view of the law decides this case."

Also held in same case (p. 506):

"The motion to dismiss the writ of error must be sustained. The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving

a federal question and broad enough to maintain the judgment. *Hammond v. Johnson*, 142 U. S. 73.

"The Supreme Court held that by reason of its decision of May 20, 1890, when the case was presented to the court on the appeal of the railroad company from the order of the lower court upon demurrer, the rights of the parties were *res adjudicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin \* \* \* (citations) \* \* \* and in this court. *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Peck v. Sanderson*, 59 U. S. 18 How. 42; *Hickman v. Fort Scott*, 141 U. S. 415. Under these circumstances the judgment of the Supreme Court is not subject to review here."

In *Rio Grande Western Ry. Co. v. Stringham*, 60 L. Ed. 136, this court passed upon the following holding of the Supreme Court of Utah:

"If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is, the law of the case, and this court, as well as the litigants, are bound thereby."

Also held in same case:

"Being in doubt which of the judgments of the appellate court should be brought here for review to present properly the question respecting the nature of its title, the plaintiff concluded to bring up both, each by a separate writ of error. Manifestly the first judgment was final within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, sec. 1214). It disposed of the whole case on the merits,

directed what judgment should be entered, and left nothing to the judicial discretion of the trial court. *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73, 1 Sup. Ct. Rep. 15; *Mower v. Fletcher*, 114 U. S. 127, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 46 L. Ed. 1141, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment,—it being final in the sense of Sec. 237,—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here. \* \* \* (citations) \* \* \*.”

In the syllabi of the Stringham case this court held:

“A decision of the highest state court, which, on a second appeal affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the federal question relied upon to confer jurisdiction was involved in the first decision and that decision was final in the sense of the Judicial Code, Section 237, governing writs of error to state courts.”

We find in the two cases, *supra*, the exact questions presented by the case at bar. Questions decided on first appeal are *res adjudicata* between the parties.

*Illinois ex rel Hunt v. Ill. Cent. R. Co.*, 46 L. Ed. 440.

*Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740.

Nothing previous to mandate can be reviewed on second appeal.

*The Santa Maria*, 10 Wheat. 431.

*United States v. Camou*, 184 U. S. 572.

*United States v. New York Indians*, 173 U. S. 461.

*Pearce v. Germania Ins. Co.*, 96 U. S. 461.

*Meyer v. Shamp*, 26 Neb. 729.

The above rule is in conformity with the well recognized rule that a case cannot be appealed piece-meal. Every point arising on first trial and not appealed is held waived on second appeal.

The proper and only method of correction of a decision on first appeal is by motion for rehearing. Review of first appeal cannot be had on second appeal.

*Stevens v. Templeton*, 174 Ind. 129.

*Damon v. DeBar*, 94 Mich. 594.

*Ill. v. Ill. Cent. R. Co.*, 46 L. Ed. 440.

*Norfolk S. & R. Co. v. Ferebee*, 238 U. S. 269.

*Kidd v. N. Y. Sec. Co.*, 75 N. H. 154.

*Gainsville, etc. Assoc. v. Atl. etc. R. Co.*, 157 N. C. 460.

*Wright v. Railroad*, 128 N. C. 77.

*Jones v. Railroad*, 131 N. C. 1333.

*Boston Bar Assoc. v. Casey*, 204 Mass. 331.

*LaRoque v. Kennedy*, 161 N. C. 459.

*Holley v. Smith*, 132 N. C. 36.

*McWilliams v. Drain. Dist.* 236 S. W. 367.

This is also the rule in Nebraska:

"If our former conclusion was erroneous, the defendant should have obtained a correction of the error by presenting a motion for rehearing \* \* \*"

*Home Fire Ins. Co. v. Johansen*, 59 Neb. 349.

"No motion for a rehearing was filed, nor \* \* \* any objection made to the decision of the court \* \* \* the question will not be again considered \* \* \*"

*O'Donahue v. Hendrix*, 17 Neb. 287.

The refusal of an appellate court to review its first appeal on second appeal where no rehearing was requested can be based upon the additional grounds of estoppel.

Particularly, is this so in Nebraska.

Under the laws of Nebraska the right to file a motion for rehearing is absolute and not—as in federal courts and some other courts—a matter of discretion. Section D of Rule 8 of the Supreme Court of Nebraska (172 N. W. p. viii) provides:



"All motions for rehearing \* \* \* may be filed *as of course* at any time within 40 days from the filing of the opinion of rendition of the judgment \* \* \*."

Rule 9 of the court (172 N. W. p. viii) provides:

"MANDATES. No mandate will issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties."

This was the situation under the laws of Nebraska. A decision had been written and filed. Petitioner was given the positive right of complaining of any errors therein by motion for rehearing. The issuance of a mandate was held up for a period of 40 days that he be given ample opportunity to complain. Petitioner knew that this decision would, unless complained of by motion for rehearing, at the end of 40 days become final and not reviewable after a mandate had been issued.

With this knowledge of the facts and law it became Petitioner's duty to request a correction of any error claimed by filing a motion for rehearing within the 40 day period, but he elected not to do this and permitted the decision to become final; *not by final decision of the court but by his own non-action* or without a word of protest.

By reason of these facts, after the mandate issued, he became estopped to complain of any errors. Had he used his remedy in the state supreme court by requesting a rehearing his status would have been different. The decision of the court would not have become final by acquiescence. He did not take the last decision granted by law. His conduct on first appeal indicated an attitude of saying to the Supreme Court of Nebraska, "you have given me opportunity to point out the error and ask a correction, but I will not do this."



I will ignore you and the Act of Congress and have a more direct decision in the Supreme Court of the United States."

All courts that have passed upon this question from the angle of estoppel have uniformly held that an appellate court will not review a decision by a lower court unless the lower court was given an opportunity, under its system of practice, of correcting the error. The remedies provided for its correction in the lower court must be exhausted—in other words, you must obtain the final or last decree of the highest court. Accordingly, the right of appeal is based upon the refusal of the lower court to *correct the error*. This is established by the following authority:

"As a rule appeal or error will not lie from a judgment or decree or irregularities which may properly be corrected on petition or motion for a rehearing."

Vol. 3 C. J. 337.

In note to *Wulzen v. Board of Supervisors*, 40 A. S. R. 17 (loc. note, p. 30) it is said:

"It follows from the rule that certiorari issues only when there is no adequate remedy at law that among the questions which cannot be presented by it, where this rule prevails, are included all those which in the particular case might have been reviewed by appeal, writ of error, *motion for a new trial*, or *other appropriate proceeding of which the party might have availed himself either in the appellate court or in the court in which the action against him was taken*, provided such court had jurisdiction of him and of the subject-matter of the action or proceeding; nor can he maintain his claim to the writ on the ground that the time within which he might have appealed, or otherwise sought redress has expired, unless, perhaps, where he can show that his failure to avail himself of the remedy which he might have pursued was not due to any negligence or fault on his part. (Citing many cases)."

In *People v. Pilot Commissioners*, 37 Barb. (N. Y.) 126, the court applied this common law rule to failure to request rehearing.

The Supreme Court of Louisiana adopted this rule as a rule of court and in at least the three following cases the failure of the Petitioner to request a rehearing in the court below was decreed fatal to the granting of the writ:

*Colomb v. Rolling*, 106 La. 37.

*In re Huddleston*, 106 La. 594.

*Frellsen v. Ruddock Cypress Co.*, 108 La. 37.

Nor will the assumption be indulged that the Supreme Court of Nebraska would not have corrected error if such error existed:

"\* \* \* We cannot assume that that body will necessarily adhere to their previous decision; but on the contrary, must assume that if that body is convinced, on a rehearing, \* \* \* that the former decision was erroneous either upon the facts or the law, it will promptly reverse its former decision \* \* \*."

*People v. Pilot Comm'rs.*, *supra*.

As hereinbefore noted this requirement of a requested rehearing is contained in the cases of *Northern Pac. R. Co. v. Ellis*, and *Rio Grande Western R. Co. v. Stringham* and in the additional case of *Norfolk S. & R. Co. v. Ferebee*, 59 L. Ed. 1303-1305.

The conduct of Petitioner in accepting the decision on first appeal without objection or motion to modify or correct claimed errors was a waiver of such errors. As held by this court in *Richmond Min. Co. v. Rose*, 114 U. S. 576, and *Tripp v. Santa Rosa St. Ry. Co.*, 144 U. S. 126, a question waived in state court will not be reviewed here.

Petitioner recognizes the law to be as stated above and because of this seeks to lead this court into the belief that these questions were not determined on first appeal. Accordingly, at pages 31 and 32 of his brief he quotes the following from the opinion of this case on first appeal, to-wit:

"In the present state of record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the operation of the gantry \* \* \*."

He claims and argues that this excerpt affirmatively shows the question to not have been determined but reserved. However, a continuation of that quotation where Petitioner leaves off, discloses the Supreme Court of Nebraska held:

"\* \* \* Passing over *these allegations* of negligence for the present let us mention what *appears* to have been palpable negligence on the part of the fellow workman (and his negligence was the negligence of defendant) in handing this explosive to plaintiff."

Continuing, the court analyzes the testimony and holds Petitioner to have been guilty of palpable negligence in the manner alleged in the petition.

While in the case at bar the Supreme Court of Nebraska discussed the venue question on second appeal, yet in deciding this question it applied the rule "law of the case" thereto, saying (Rec. p. 202):

"No motion for rehearing was made in this court after the filing of the former opinion in this case and the former decision of the court has become the law of the case."

This was a decision of the venue question based upon the very facts involved in the Stringham and Ellis cases, *supra*, which this court held to not be a federal ground or decision. Even if the discussion of the venue question on second appeal could be held to be a decision of the merits of the venue

objection yet, as just shown, its decision on this venue question was based also upon the proposition that the first trial decision *had become the law of the case*—non-federal ground of decision.

"This court will not review a state judgment, although a federal question was decided adversely to the plaintiff in error, if another question, not federal, was also raised and decided against him, the decision of which is sufficient to sustain the judgment."

*Harrison v. Morton*, 171 U. S. 38.

"Where the highest court of a state, in rendering judgment, decided a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the federal question."

*Rutland Co. v. Cent. Vt. R. Co.*, 159 U. S. 630.

"A judgment of a state court based upon an estoppel on general principles of law and a statute of the state, irrespective of any federal question, as an independent ground broad enough to maintain its judgment, cannot be reviewed in this court on writ of error, although a federal question was also decided."

*Gillis v. Stinchfield*, 159 U. S. 658.

Insofar as the venue question on first appeal was concerned the decision of the Supreme Court of Nebraska was based solely upon the ground that the question by not having been cross-appealed was waived (Rec. p. 213) this was a decision upon a non-federal ground. Even had the decision been upon a federal ground such decision would have been correct for, as held by this court in the recent case of *Peoria & Pekin R. Co. v. U. S.*, 68 L. Ed. Adv. Sheets, page 195, a failure to cross-appeal from claimed errors in the court's holding on objection to venue is a waiver of that objection (see *infra* pp. 20 and 21).

It therefore follows that the questions of whether Respondent was injured by Petitioner's negligence; whether he was engaged in interstate commerce within the meaning of the Federal Employer's Liability Act; whether he assumed the risk and Petitioner's venue objection were all questions which cannot be reviewed by this court. This is true for the reasons (1) that no review is asked of the first appeal and (2) insofar as the second appeal is concerned the decision was upon a question of general practice and in no manner involving a federal question.

But two other questions are presented by Petitioner, viz: (1) Substitution of parties defendant, and (2) a bare suggestion of error in an instruction.

The first of these is not open to dispute. The Winslow Act by its plain terms authorized such substitution.

The second is a suggestion. Petitioner does not argue it nor point out any claimed error therein. As a matter of fact the instruction was correct (Pet. Br. p. 7). It informed the jury of claimed acts of negligence on the part of Petitioner, all fully established by the evidence.

There is no color of merit in either of these questions.

The judgment of the Nebraska court should be affirmed without the necessity of considering Petitioner's argument as it is apparent this writ of certiorari presents no question that is not frivolous and wholly without merit, or fully foreclosed by prior decision of this court.

#### I.

**PETITIONER CONTENTS THAT THE DISTRICT COURT OF DOUGLAS COUNTY WAS WITHOUT JURISDICTION OF HIS PERSON OR THE SUBJECT-MATTER BECAUSE OF DIRECTOR GENERAL'S ORDERS 50, 50-A, 18, 18-A, AND 18-B, PRO-**

**VIDING THAT ACTIONS BE BROUGHT IN THE DISTRICT OR COUNTY WHERE PLAINTIFF RESIDED WHEN INJURED OR WHEREIN INJURED.**

**RESPONDENT'S CONTENTION IN ANSWER THERETO IS THAT ALL RIGHTS GRANTED PETITIONER UNDER THESE ORDERS AMOUNTED MERELY TO A VENUE PRIVILEGE, WHICH PRIVILEGE WAS (a) WAIVABLE AND (b) IN THIS CASE WAIVED.**

**(a) THE VENUE PRIVILEGE WAS WAIVABLE.**

Under the provisions of the Federal Employer's Liability Act, the District Court of Douglas County had jurisdiction of the subject-matter or "the class of cases to which this particular case belongs."

Actions for personal injuries brought under this federal act are transitory.

*K. C. W. Ry. Co. v. McAdow*, 60 L. Ed. 520.

*Atchison, Topeka & S. F. v. Sowers*, 53 L. Ed. 695-700.

*Ches. O. & Del. R. Co. v. Heath, Admr.*, 87 Ky. 651.

*Gilman v. Ill. C. R. Co.*, 137 Ky. 375.

*Director General v. Into*, 83 Fla. 377.

The Director General's orders did not attempt to limit the jurisdiction of courts over the subject-matter of such actions. The only provisions of the orders in this respect are that actions be brought in either the county or district wherein the injury occurred or wherein the plaintiff resided when injured. Provisions, such as these, have repeatedly been held to not affect jurisdiction over subject-matter—to confer a mere personal privilege for the benefit of the defendant, which he can waive. It is a privilege of venue only.

The latest holding of this court upon this subject is found in *Peoria & Pekin Railway Company v. United States*, 68 L.

Ed. Adv. Sheets 195, being an action brought in the Southern District of Illinois by the railroad company against the United States to enjoin enforcement of an emergency order of the Interstate Commerce Commission concerning switching. The Interstate Commerce Commission and another intervened. The Transportation Act of 1920 provided that such actions be brought in the district of the residence of the party for whose benefit the action was begun. In disposing of an objection interposed by the United States, that, because of this statutory provision, the court was without jurisdiction, this court said:

"The United States contends, also, that the decree dismissing the bill should be affirmed, because, under the Act of October 22, 1913, \* \* \* the proper venue was the district of Iowa, that being the residence of the Minneapolis & St. Louis Railroad. \* \* \*

"The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his benefit. If there were a lack of jurisdiction in the district court over the subject-matter, we should be obliged to take notice of the defect, even if not urged below by the appellee \* \* \* (citations). But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue. See *Camp v. Cress*, 250 U. S. 308 \* \* \* This privilege not to be sued elsewhere can be waived; and it was waived both by the Minneapolis & St. Louis Railroad and the Commission. The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter its objection, the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered \* \* \* (citations). We have, therefore, no occasion to consider whether the suit was brought in the proper district."

There is no difference in principal between this case and the case at bar which is authorized by the Transportation Act of 1918. The Director General's orders can in no sense



have a higher dignity than the statutory provision in the *Peoria & Pekin case*, and no stronger construction than being a part of the Transportation Act of 1918. If the venue provision of the Transportation Act of 1920 was waivable as held in the *Peoria & Pekin case* then the venue provision of the Transportation Act of 1918 must necessarily fall within the same rule and be waivable.

The rule has been applied and followed in actions brought under the Tucker Act whereby the United States consented to be sued for recovery of stamp taxes wrongfully collected, but *provided action should be brought in the County wherein plaintiff resided*. (*United States v. Hvoslef*, 237 U. S. 1, followed in *Thames & Mersey, etc. Co. v. United States*, 237 U. S. 19). In both cases this court held such provision as to district of suit to be "but a modal and formal one, which could be waived" and to have been waived in each case.

It is readily apparent that in principle the provisions of the Tucker Act in the two cases supra, is identical with the case at bar, wherein the Government consented to be sued for damages for personal injuries arising under federal control of railroads, but provided (through these orders) that such action be brought in certain districts. Both the Tucker Act and the Transportation Act of 1918 authorized actions against the United States; both provided the venue for such actions. The fact that one is for recovery of stamp taxes and the other damages for personal injuries is immaterial—the principle remains the same. The venue privilege of the Tucker Act being waivable, then the venue privilege involved in the case at bar must likewise be waivable.

Again, in an action brought against a national bank the provisions of Federal Act directing the action to be brought in a certain district was held waivable. *The First National Bank of Charlotte v. Morgan*, 33 L. Ed. 282. The same



principle involved in the case at bar is again found and again determined by this court to be waivable.

The rule has been applied repeatedly in connection with Sec. 51 of the Federal Judicial Code and kindred acts. Thus, in the recent case of *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, an action for personal injuries, this court held that a plaintiff by bringing an action in a state court in a certain district waived the provision of Section 51 of the Federal Judicial Code, which provided that where jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant. The court said that such a statutory provision "does not limit the jurisdiction of the district courts, but merely confers a personal privilege on defendant, which he may assert or waive, at his election."

The following additional cases are along the same line as the cases immediately supra, viz:

*Interior Construction Co. v. Gibney*, 40 L. Ed. 401.

*St. Louis v. McBride*, 141 U. S. 127.

*Western Loan & Sav. Co. v. Butte, etc. Co.*, 210 U. S. 368.

*Central Trust Co. v. McGeorge*, 151 U. S. 129.

*McCormick Har. Mach. Co. v. Walthers*, 134 U. S. 41.

*Texas etc. Co. v. Cox*, 145 U. S. 593.

*Ingersoll v. Coram*, 211 U. S. 335.

*In re Chicago, R. I. & P. Ry. Co.*, 65 L. Ed. 631 (Syl. 3 and 4).

In every instance the provisions of federal acts as to venue of actions—whether those of the Judicial Code, the Tucker Act, the National Bank Act (even for patent infringements) or the Transportation Act of 1920—have been always held to confer a mere personal privilege upon the defendant which can be asserted or waived. And, as held in the *Pekin and*

*Peoria case*, and the two cases under the Tucker Act, *supra*, the fact that the United States is party defendant does not alter the rule.

*Director General of Railroads v. Into*, 83 Fla. 377, involved the precise question presented in the case at bar. Action was against the Director General for damages for death of plaintiff's decedent. The Director General interposed the defense that the action could not be maintained where brought if the plaintiff was not a resident thereof, because of the provisions of these orders. The court held the orders to confer only a personal privilege for the Director General which could be waived and was in that case waived by entering a general appearance. The decision, of this court in *Alabama, etc. Co. v. Journey*, 66 L. Ed. 154, was noted and its holding that the orders were valid was followed.

*Stanley v. Schwalby*, 162 U. S. 255, and other cases cited by Petitioner at page 17 of his brief are not in point. The action of *Stanley v. Schwalby* was a plain suit of ejectment against the United States brought in state court. It was decided on general law that the United States is a sovereignty not subject to suit excepting where authorized by Congress. There was no authority ever given by Congress for such suits. Hence no officer of less authority than Congress could by waiver or any other manner authorize a suit against the government for eviction to lands claimed for a fort.

This is not authority here because under the Transportation Act of 1918 Congress gave authority to sue the Director General. The Director General had also been given authority to make rules within certain constitutional limitations and he made them.

If the Director General had the power to enact rules he had the power to waive them. This is fundamental, but the strongest reasons of all are that under the decision of the

Supreme Court of the United States, these rules of privilege may be waived by the Director General.

It is clear under these authorities that the venue provision of the orders could be waived. The next matter in order is to show that Petitioner did, in fact, waive the venue privilege in several instances.

(b) FACTS CONSTITUTING WAIVER.

That a clear understanding may be had of the facts for discussion of waiver of venue, a brief history of steps taken will be made:

Respondent was injured on September 13, 1919, and on February 9, 1920, filed his petition in the District Court of Douglas County, Nebraska. This petition was silent as to residence and county where accident occurred. February 12, 1920, summons was served. March 8, 1920, petitioner filed a "special appearance and motion to quash the summons" attacking jurisdiction of the court "over the person of the defendant *and over the subject-matter*" of the action, because of Director General's orders, alleging that Respondent was injured in Council Bluffs, Pottawattamie County, Iowa, and *resided there at the time of receiving his injury*. Under these pleadings, Petitioner had taken the affirmative of showing residence. No proof of any kind was offered on these claims, but they were abandoned and the court accordingly on March 13, 1920, overruled the objection. 2

April 2, 1920, Respondent filed an amended petition, which, like the original petition, was silent as to Respondent's residence and place where injured.

April 12, 1920, Petitioner filed his answer in which he alleged Respondent resided when injured and to have been injured in Council Bluffs, Iowa.

*This was the last heard of the venue objection until December 16, 1921—a period of over twenty months.* (The cause had been submitted on briefs and arguments to the Nebraska Supreme Court and had been under consideration for six months before the venue objection was again heard of. Petitioner's general conduct suggested, and, from beginning to end shows uncontrovertible proof of an intention to waive. The one glaring fact which we will notice is that nowhere in the first trial did Petitioner ever claim the privilege of a different venue.

While we direct particular notice to the whole conduct of Petitioner showing constructive and intentional waiver from beginning to end—yet this one continuous waiver was made up of several independent acts of waiver, each of which gave the court jurisdiction of the person because any one waiver was enough. Once waived, forever waived. "A waiver of such objection must operate once for all."

*Baker v. Union St. Yards National Bank*, 63 Neb. 801.

*Shutte v. Thompson*, 21 L. Ed. 123-125.

This is why the Nebraska Supreme Court discussed at length only one waiver, though referring to and noting other acts of waiver.

A question waived in a state court will not be reviewed here.

*Richmond Min. Co. v. Rose*, 114 U. S. 576.

*Tripp v. Sant Rosa St. Ry. Co.*, 144 U. S. 126.

#### (1) Failure To Make Timely Objection.

The act of waiver which we wish to discuss first, occurred when plaintiff, the first witness, testified on cross examination that he was a resident of Pottawattamie County, Iowa, and was injured in said county. *Petitioner neglected to assert his privilege by then and there objecting to proceeding further, because of want of jurisdiction over the person*

(p. 10, addition to record). This testimony by the plaintiff and certificate of clerk (pp. 35 and 31, addition to Rec.), that all orders and objections are in the transcript and the whole transcript as certified, containing no such objection shows this waiver.

We reason that Petitioner, about the time the case was called, felt secure under the attitude of fairness of the state court; believed he could win upon the merits of the case, and desired to waive his privilege and have then and there in his favor a judgment upon the merits which would be *res adjudicata* and bar any later proceedings in Iowa. Petitioner's proper procedure is so much like waiver of right to remove by failure to immediately act on disclosure of facts during trial which justifying removal that this line of cases are authoritative on this point.

*Fritzlan v. Boatman's Bank*, 212 U. S. 364.

## (2) By Motion To Dismiss.

Another act of independent waiver, or corroborative act of continuous waiver, occurred when plaintiff rested at the conclusion of his evidence upon the first trial.

Petitioner then moved for a judgment on the question of sufficiency of evidence on the merits of the case, and that alone. His motion to dismiss so limited, confirms Petitioner's policy of waiving and calling to his aid the power of the state court in a judgment that would protect him against future actions. This motion at page 13 of the addition to the record does not mention venue privilege or jurisdiction over the person, or what was proven as to residence and location on such a point. The motion follows:

"The defendant now moves the court to dismiss the action for the reason that the plaintiff has not proved facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant under the pleadings and issues in this case."

This waiver cannot be disputed. The Petitioner or defendant in the first trial proceeded with the introduction of his evidence until both sides rested.

(3) By Second Motion to Dismiss.

Then another act of waiver, or continuing confirmation of previous waiver, occurred.

Petitioner, or defendant, having theretofore neither presented, nor maintained an objection, nor asserted his privilege, once more showed a disregard of such privilege by omitting from his motion any reference to lack of jurisdiction over the person *and confining his motion to direct a verdict exclusively on grounds going to the merits*. This motion (p. 19 of Add. Rec.) is as follows:

"I wish to renew my motion made at the beginning of the trial. (Close of plaintiff's case above.) Comes now the defendant at the close of all the evidence and moves the court to dismiss this action for the reason that the evidence *fails to prove a cause of action* against the defendant and in favor of the plaintiff."

There is not a word about sufficient evidence being produced to show the wrong venue as a basis to claim privilege, or even an objection to venue, but only *failure* of evidence to *prove the cause of action*.

The certificate to this transcript that all motions and objections were included and the absence of any motions or objections therein relating to this question makes it perfectly clear that Petitioner never asserted the privilege not to be sued in Nebraska at the time such a privilege was made apparent to the court. On the contrary, Petitioner confined and limited his objections to the merits of the controversy or sufficiency of the evidence to constitute a cause of action.

But while Petitioner does not *directly* claim that he made such objection, or motion, he does indulge in equivocations in an apparent effort to induce a suggestion that such objections and motions were properly made. As an example thereof, at page 22 of his brief, he says:

"\* \* \* The statement (of the Supreme Court of Nebraska in its opinion) that no objection was made during the trial to the jurisdiction of the court is *misleading* and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence.  
\* \* \*

By this statement Petitioner merely claims that the objection was alleged in his answer and that *later evidence was received* as to place of injury and residence in another state. He does not say *that after the evidence was adduced* he made any objection or motion. He never called the court's power to his aid when the case may have justified its exercise.

It may be Petitioner is not intending to equivocate, but is contending that it was sufficient that the objection be set up in the answer and proof be adduced in support of it—that calling the court's attention to the objection by motion or otherwise was not necessary. Such a proposition would be unsound, and wholly opposed to the well-settled practice in every jurisdiction. Petitioner, of course, had a right to insist upon his venue objection. And he had the right to waive it. When the proof was sufficient to sustain the objection then the privilege ought to have been called to the attention of the court and claimed. If he did not do so when the proper time arrived he waived. He remained silent then and thereafter. In so doing he was acting strictly within his rights. It was his business whether he wanted to insist on the objection or waive it. The trial court, even if it knew of the venue privilege had no duty to dismiss the action without Petitioner's request. Petitioner had the undeniable right to waive it, and to seek a decision in that court which would be *res adjudicata*.



Because of these conditions, a federal right in this respect was never denied. By failing to call the trial court's attention to the venue objection, Petitioner never gave the trial court an opportunity to deny, or grant a federal right.

Petitioner, on first trial, then and there got just exactly what he wanted and asked for—a dismissal of the action strictly *on its merits*, on the sole question of the sufficiency of the evidence to *constitute a cause of action* against the Director General.

“ \* \* \* The contention of the government is inadmissible for the reason that it does not appear that the objection as to the district was raised below, and the decision of the district court \* \* \* was invited upon the merits.”

*Thames S. Mersey M. Ins. Co. v. U. S.* 237 U. S. 19.

Petitioner was satisfied with that final adjudication which he accepted and swallowed with satisfaction; he then wanted no decision affecting the jurisdiction of the court over either the person or the subject-matter. He was then like the Merchant of Venice—“Oh, Righteous Judge!” He did not want that decision to be reversed or modified by either appeal or cross-appeal. He was for the decision and for the court.

#### **(4) Failure To File Motion for New Trial.**

We have another corroborative act of waiver in Petitioner's failure to file a motion for new trial after first trial.

The statutes provide for correction of errors in the trial court by motion for new trial. But the Supreme Court has modified the earlier understanding of this obligation, to exhaust that motion for new trial remedy before appealing, in holding that in equity cases and cases tried without a jury a motion for new trial is not necessary. This case does not fall within the exception for the reason it was a jury case. (The special appearance before trial was properly overruled



because no evidence was offered and no exceptions were taken.) After trial started, evidence of residence in Council Bluffs was received by admission of plaintiff and no objections to proceeding with the case were taken or rulings had for exception. If such a motion had been interposed, or asserted itself after trial begun and it was wrongfully overruled by some process of implication either known or unknown to practice, it would have been an *error during a jury trial* which would be waived unless saved by a motion for new trial. The failure to file a motion for a new trial to preserve objection in "special" appearance—had there been one—was fatal. There was no objection in fact as a basis for a motion for new trial on ruling upon venue. This failure, taken with the numerous other acts in this trial unmistakably shows Petitioner's intention to waive the privilege of venue and to fight the case in the state court on the merits. This is another reason why Petitioner did not cross-appeal. He had waived, or failed to lay the foundation for cross-appeal by failure to file a motion for new trial. He cut himself off from the right to cross-appeal by this waiver.

#### (5) Failure to Cross-Appeal.

Respondent filed a motion for new trial assigning as the sole error, the court's sustaining of Petitioner's motion to dismiss the action on the questions of sufficiency of evidence of negligence under Federal Employer's Liability Act and assumption of risk. This motion for a new trial was overruled, and Respondent perfected an appeal to the Supreme Court of Nebraska to reverse the ruling. Only one error was assigned, viz: Overruling Respondent's motion for a new trial.

Under Nebraska procedure, in fact, under the procedure in all jurisdictions, all rulings made in the trial court became final upon the dismissal of the action by the trial court and subject to review on appeal.

Petitioner had the right and duty to meet us at the threshold of the Supreme Court with a cross-appeal from any trial rulings—adverse to his substantial rights—which he saw fit to present. Such cross-appeal, however, was required to be perfected within four months after final determination of the action, viz: its dismissal in the trial court (see foot note, page 23, brief of Petitioner).

Apparently Petitioner was fully satisfied with all that had taken place in the trial court. He gave up his objection to rely upon the rulings of the state court. He took no cross-appeal. He continued in his abandonment of his venue privilege. He joined issue in the Supreme Court upon the sole error assigned by Respondent, and although allowable to cross-appeal, his "Propositions of law involved in the case and relied upon by the appellee" omitted all reference to the venue objection (Add. Rec. p. 24). The transcript presented to the Supreme Court of Nebraska contained only matters necessary to determine the negligence and assumption of risk issues, and omitted all reference to Petitioner's "special appearance and motion to quash" and the ruling had thereon. Petitioner, in stating the issues to the Supreme Court of Nebraska in his briefs, omitted all reference to the venue objection and even left out these features of his answer, indicating such portions he omitted by asterisks (Add. Rec. p. 22). In the brief that should have contained a cross-appeal (had he desired to make one) he, in stating the issues said—using bold type for emphasis (Add. Rec. p. 24):

*"This action is brought under the Federal Employer's Liability Act. The sole question for determination is, whether the plaintiff proved facts sufficient to constitute a cause of action."*

On November 18, 1921, some six months afterward a re-argument of the case was ordered for the following January before the Nebraska Supreme Court sitting in one group or division.

On December 16, 1921, Petitioner filed a "Supplemental Brief" (Add. Rec. p. 28) in which he sought to raise the venue objection. *THIS WAS THE FIRST HEARD OF THE VENUE OBJECTION, IN ANY COURT, SINCE IT WAS SET UP IN THE ANSWER FILED APRIL 12, 1920.* On December 23, 1921, Petitioner requested permission to file a supplemental transcript to include the original petition, summons and sheriff's return thereon, and the special appearance and motion to quash and the court's ruling thereon. These instruments had not been transcribed to the Supreme Court as not necessary to the determination of the ruling Respondent appealed from.

This was more in the nature of a belated attempt to inject the question into the record than to cross-appeal. It was an after-thought that *emphasizes the waivers* of Petitioner. Respondent filed objections to the filing of such proposed supplemental transcript or consideration of the venue objection with supporting brief. The matter was submitted to the court on the date of re-argument and the Supreme Court thereafter passed upon the question saying (Rec. p. 213):

"Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. (See subdivision b, Rule 18 of this court)."

This decision forever settled the venue objection insofar as this case was concerned. Under the law of Nebraska questions not cross-appealed are *finally closed* in the trial court; *Western Brick & Supply Co. v. Midwest Const. Co.*, 101 Neb. 254. Even if proper and sufficient objections had been interposed by Petitioner throughout the trial so as to save the point, his failure to cross-appeal would have constituted a waiver of the objection.

*Peoria etc. R. Co. v. U. S.*, 68 L. Ed. (Adv. Sheets, p. 195).

Petitioner says (brief, Petitioner, p. 22) that because his motion to dismiss was sustained there was no reason for him to complain further than that the court had no jurisdiction. That is just the question we are arguing. Petitioner, in the early proceedings of the first trial was satisfied with this jurisdiction—he was winning and waiving and did not care to object to the jurisdiction of the court. The court was giving him what he wanted. The court was killing Respondent's case forever. Therefore, Petitioner was invoking, and having the benefit of the power of this court. But when Respondent appealed from the orders and decisions against him the Director General did not want his objection to jurisdiction sustained. No other court could have given him more. That is why he did not attempt a cross-appeal. Besides all possible steps of that kind had already been waived directly or indirectly by not having been asserted as shown and consequently he was not denied this federal privilege because he did not opportunely claim it, as a basis for appeal, nor attempt a cross-appeal.

Upon page 23 of Petitioners' brief his counsel try to say there was no final order entered against appellee and consequently nothing upon which to cross-appeal *because defendant prevailed below*. But he prevailed against plaintiff *upon the merits and not on the question of lack of jurisdiction over the person*. Petitioner lost on that question and

stopped, satisfied that Respondent could not reverse the case upon the merits.

The resultant argument of *Petitioner* is that the judgment against the Director General *on venue was not final*, although the judgment against Respondent *on the merits was final*. But he is wrong. *Every interlocutory order from which appeal may not be immediately prosecuted becomes final and subject to review, unless waived, whenever the judgment is entered.* A final judgment makes all previous orders and steps thereby final so that every question and objection preserved may be reviewed on one appeal. While *Petitioner* could not have stopped proceedings to appeal from the overruling of his special appearance at that time, he could later; and at the proper time he could by cross-appeal have contested our right to review the merits of the case at the time we sought our appeal. (Could any reasonable lawyer believe that he wanted to cross-appeal?)

Upon the question of interlocutory orders becoming final by final decree see following cases:

*State v. Westorer*, 89 N. W. 1002.

*Lewis v. Barker*, 46 Neb. 662.

*Gonzales v. Duey*, 15 Ariz. 331.

*Whitelaw v. Ins. Co.*, 86 Kan. 826.

*Walter v. Staines*, 118 N. C. 842.

*Wood, Carter & Co. v. Mo. P. R. Co.*, 152 Cal. 344.

*Levering v. Webb Publ. Co.*, 108 Minn. 201.

*Grunwalt v. Grunwalt*, 24 Okla. 756.

These cases show the fallacy of counsel's complaint that they could not have preserved their objection by cross-appealing because the ruling was on an interlocutory order. This court has held *that it could have been done*, and when the Supreme Court of Nebraska held on the first appeal that it was not done, that decision became the law of the case.

Under the cases cited, there can be no question of this. The case at bar is identical with *McDowell v. Chesapeake, D. & S. R. Co.*, 14 S. W. 338, in which the Kentucky Supreme Court held (Syl.):

"Where a special demurrer to a petition, raising the question of jurisdiction (venue), is overruled, and a general demurrer to the evidence is sustained, defendant cannot, after a reversal of the decision on the general demurrer, the question of jurisdiction (venue) not having been raised on the appeal, again raise the question of jurisdiction (venue) by answer."

We bracket "venue" after the word "jurisdiction" in the above citation for the reason that the question was one of venue—an action growing out of tort where defendant was summoned in a county other than that prescribed by statute.

Therefore, if Petitioner wished to rely upon his privilege and had properly preserved it without waiver, he should have presented the same to the Supreme Court and circumvented any other consideration of the case there. This failure was a waiver and no doubt not asserted because of being satisfied with this venue. It was never properly presented to the state Supreme Court. But suppose the Petitioner, or defendant, had wanted to cross-appeal after respondent had filed his appeal, what was his status?

Petitioner had offered no evidence on his special appearance and therefore would have had no foundation for predicated error on overruling the same. After this waiver no objection was ever made to jurisdiction over the person when the evidence was obtained by Respondent's admission and no objection was included in the motions, but the only two motions made to dismiss were predicated on *sufficiency of evidence*. These motions were waivers of venue privilege because of omission to assert a federal right, or this federal privilege, which the state court was given no opportunity to deny. *How could Petitioner, or defendant, have successfully maintained a cross-appeal to the state court, much less*

jump over one court and present it to the Supreme Court of the United States?

More than this he did not *attempt* to cross-appeal, which abandonment is a waiver, as held by the Supreme Court of Nebraska in this case (Rec. p. 214), and as held by this court in case of *Peoria, etc. R. Co. v. U. S.*, 68 L. Ed. (Adv. Sheets, p. 195).

**(6) By Abandoning Special Appearance.**

We may call attention to another fact showing waiver in the very beginning. While petitioner, upon the record *may have filed* an answer including claim of venue privilege, we find that instead he supplied the omission of place of residence from plaintiff's petition in his special appearance which thereby placed the pleadings *the same as if that fact was alleged in the petition* and thereupon charged defendant with such knowledge as he had assumed the burden of establishing. Therefore, his failure to present these facts or offer evidence upon this special appearance, after he voluntarily made it, should not be considered an oversight. That act of abandonment of this position in the light of the entire record and all following acts must be construed as an act of waiver—*waiving the offer of evidence, defendant, or petitioner*, had knowledge sufficient to allege in a motion to the pleadings.

After Petitioner, or defendant, waived the offer of his evidence the court on that account properly overruled his special appearance. No other conclusion may be drawn but that Petitioner waived his special appearance, after having admitted knowledge of these facts and having asserted the same.



"A party may waive any provision, either of a contract or of a statute, for his benefit \* \* \* and if he does he cannot afterwards avail himself of them."

*Shutte v. Thompson*, 21 L. Ed. 123-125.

**(7) By Direct Language in Brief.**

The next waiver or confirmation of the original and continuing waiver is in the direct admissions of counsel for Petitioner before the court in his brief in the Supreme Court on first appeal (see pp. 44 and 45 hereof).

**(8) Failure To Ask Rehearing.**

Under Nebraska practice forty days are allowed after an opinion is filed by the Supreme Court before a mandate issue. This forty day period is to enable the parties to request a rehearing of any points believed to have been erroneously decided. Petitioner was evidently satisfied that none of his rights including the venue proposition had been denied him. No motion for rehearing was ever made, and, at the end of the forty days period, a mandate issued to the District Court of Douglas County, reversing the decision and ordering new trial.

On second trial and appeal, Petitioner reversed his first-trial attitude. He decided he wanted to stand upon the venue objection. The reason therefor was obvious. He lost before the Supreme Court *on sufficiency of the evidence*. Over two years had elapsed from the happening of the accident and any new action attempted to be prosecuted in any other jurisdiction would be barred under the statute of limitations. In fact, a new action was barred some four months at the time Petitioner sought to bring his objection *back to life* (if it ever had life) and inject it into the first appeal. Then a dismissal of the action on second trial on account of venue would be a final conclusion and simply beat a blind boy. Now, the only thing left for him was to forget estoppel and bear down on the venue proposition.



In case of *Shutte v. Thompson*, 21 L. Ed. 123-125, it was said:

"If he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all."

After the first appeal, Petitioner demonstrated quite clearly this new interest in and knowledge of how to advance the venue objection. He took the steps he should have taken on first trial excepting only the original error of uniting objection to jurisdiction over the person with objection to jurisdiction over the subject-matter as an inseparable statement thereby claiming too much power for a Director General order. (Petitioner could not, of course, rewrite his special appearance and answer.) On second trial, insofar as his venue objection was concerned, he: (a) objected to the impaneling of the jury (Rec. p. 38); (b) moved a dismissal on this specific ground at the close of Respondent's case in chief (Rec. p. 85); (c) made a like motion at the close of all the evidence (Rec. p. 190); (d) filed a motion for a new trial, alleging error, among others in the trial court having overruled his objections set out above, being careful to recite that even this was subject to his objection to venue.

Petitioner understands that he intended to and did waive the venue objection on first trial and appeal of this action and knows that the full records of the case so show. It was this knowledge that caused him to fail to incorporate the first trial and appeal proceeding in either the exhibit to his petition for writ of certiorari or the return to the writ. His actions confess a waiver, as much as fleeing sug-

gests guilt. He knew that this covering up would give him an advantage.

(9) By Joining Objections of Jurisdiction.

We next consider the first act of waiver discussed by the Supreme Court of Nebraska in its opinion. This waiver is the one occurring by reason of defendant having *joined an objection to the jurisdiction of the court over the subject matter with objection to jurisdiction over his person.*

Petitioner's argument from pages 8 to 26 of his brief is confined with a single exception, to discussion of this act of joinder constituting waiver. He seeks to lead this court into the belief that this is the only waiver involved. But, as hereinbefore shown, several waivers occurred.

The single exception of Petitioner discussing other acts of waiver occurs on page 22 of his brief whereat he sets out the following excerpt from the Nebraska Supreme Court's opinion on second appeal:

"But no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

He says, concerning this, that he does not see how this statement tends to show jurisdiction. It is clear the court, in the above quoted short extract, said the following things, viz:

*First.* During the long procedure of trial no objection was made as to jurisdiction of person or venue;

*Second.* The original motion to quash the summons was properly disposed of by being overruled for want of evidence to support it;

*Third.* Not even a motion for rehearing was made to call up any question that had been overlooked;

*Fourth.* The former opinion was suffered to become the law of the case or accepted.

The position taken by counsel caused us to put a magnifying glass on the language of the court and bring out the four additional acts of waiver found by the court and confused by Petitioner. It clearly demonstrated other waivers were involved and noted besides the one of joining objection to jurisdiction over subject-matter and person.

#### PERRINE CASE CONSIDERED.

*Perrine v. Knight's Templar, etc. Co.*, 71 Neb. 267; 71 Neb. 273:

"As said in *Western Indemnity Co. v. Rupp*, 235 U. S. 261, \* \* \*:

"A non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714, 732, 733; *York v. Texas*, 137 U. S. 15, 21. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled.'" (Per Opinion on second appeal, Rec. p. 201.)

The Nebraska Supreme Court did not "arbitrarily refuse to give effect to the war order in question" (Br. Pet. p. 24); nor seek to evade it "by innovations in local practice appli-

cable to the case at bar and flatly at variance with its own previously well-settled rules" (Br. Pet. p. 26); nor did "the Supreme Court of Nebraska merely suspend the rules of practice, settled by its former decisions, and did not over-rule them"—nor is the opinion "'special' and not 'general'" (Br. Pet. p. 24).

The requirement of Nebraska practice that persons who wish to appear "specially" to object to the court's jurisdiction over their person must stay out of court for all other purposes is established by a long line of cases of which the Perrine case is the keystone case (decided in 1904). It has never been overruled or modified, but to the contrary has been consistently followed as shown by the following cases (in most of which the Perrine syllabus upon this point was specifically quoted and adopted):

- Brainard & Chamberlain v. Butler, etc.*, 77 Neb. 515.
- Summit Lbr. Co. v. Cornell-Yale Co.*, 85 Neb. 468.
- Lillie v. Mod. Woodmen of Amer.*, 89 Neb. 1.
- Clark v. Banker's Acct. Ins. Co.*, 96 Neb. 381.
- Rakow v. Tate*, 93 Neb. 198.
- Maxwell v. Maxwell*, 106 Neb. 689.
- State etc. v. Westover*, 107 Neb. 184.
- Legan v. Smith*, 98 Neb. 7.
- Mahr v. Union Pacific R. Co.*, 140 Fed. 921.

In the Perrine case defendant invited an inquiry of the court on the question of whether or not the action was *transitory* thereby destroying the venue privilege or special appearance and resulting in a general appearance. In the case at bar we have the presentation of the identical question, viz: that Petitioner asked the court to hold that the Director General orders made the action local and not transitory which request waived the venue privilege and made it a general appearance.

Petitioner contends the Perrine case to be an authority in his favor. Let us analyze it:

The facts in the Perrine case were as follows: Perrine, a non-resident of Nebraska, instituted an action in Jefferson County, Nebraska, upon an insurance policy. As required by Nebraska statute, the defendant insurance company had executed a power of attorney constituting the auditor of Nebraska and his successors, its attorney in fact upon whom lawful process could be served. Service was had upon the auditor of Nebraska in Lancaster County. Thereupon the defendant appeared and filed the following instrument:

"Comes now specially the above-named defendant, for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits the court is without jurisdiction of the subject-matter or of the person of the defendant, for the following reasons:

. . . . .

"(5) That the defendant is a foreign co-operative and mutual insurance company, doing business in the state of Nebraska only by virtue of license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson County, or in the state of Nebraska, and the plaintiff is not now, nor ever has been a resident or citizen of the state of Nebraska."

This special appearance was sustained by the trial court and the ruling appealed to the Supreme Court. On hearing the ruling was reversed (71 Neb. 267), for the reasons stated in second syllabus:

"The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; *but*, where the motion *also* challenges the jurisdiction of the court over the *subject-matter* of the controversy, *and is not well-founded, it is a voluntary appearance, equivalent to a service of summons.*"

Later, a rehearing was granted and on such rehearing the Supreme Court adhered to its previous decision, saying (71 Neb. 273) :

"The 5th objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was *local or transitory*. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, *not of the person*, but of the subject-matter of the action. *And, when followed by an exhaustive showing on this point, (as was done) of the truth of these allegations, we can come to but one conclusion, and that is, that it was the intention of the pleader to challenge the jurisdiction of the court over the subject-matter, and that he has done so both by his averments and by the evidence.*"

And Petitioner's conduct is squarely within the rule announced in the Perrine case. His so-called special appearance, like that in the Perrine case, objected to the court's jurisdiction of both subject-matter and person, and for the "assigned reason" that the action was not transitory under the Director General's orders which limited the court's jurisdiction over both subject-matter and person. Moreover, as in the Perrine case, we find Petitioner in his reply brief on second appeal (Add. Rec. p. 34) contending:

"Under these orders of the Director General the defendant was privileged from suit upon the plaintiff's cause of action in *all jurisdictions, except Pottawattamie County, Iowa*. Actions against the Director General for personal injuries growing out of the federal control of railroads are not *transitory* but *are local* under the plain terms of the order."

And this contention regarding subject-matter was even carried into this court as shown by the following:

"The question as to whether or not the cause of action was local or transitory was answered by the order

itself in plain language. *It was not transitory, except within the limits of the order.* The very purpose of the order was to make what had theretofore been a transitory cause of action a local cause of action, statutes and decisions to the contrary notwithstanding." (Petition for writ of Certiorari, p. 2).

"The question as to whether the court had jurisdiction does not depend upon whether or not the defendant appeared but upon the *validity of Order 18-B.*" (Petition for writ of certiorari, p. 11).

"The question as to whether or not the District Court of Douglas County had jurisdiction does not depend upon whether or not the special appearance and motion to quash constituted a general appearance under the rules of local practice; *but depends upon the validity of the orders. The District Court of Douglas County was without jurisdiction even though the defendant did file a general appearance, which we deny, by filing the motion to quash the summons \* \* \**" (Brief, p. 16).

This last excerpt is followed with further argument that the Director General's orders *made the action local.*

In the light of the excerpt quoted from Petitioner's reply brief filed on second appeal and the other matters referred to it is not necessary to show additional matters which led the Supreme Court of Nebraska to announce a finding that (Rec. p. 198) "it is strongly urged that the court had no jurisdiction of \* \* \* the subject-matter of the action \* \* \*." Above excerpts furnished sufficient grounds for the Nebraska Supreme Court's findings in this case to-wit:

"Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this be done."

In view of the contents of Petitioner's answer (Rec. p. 16) and these contentions in both the Supreme Court of



Nebraska, and this court, of what value is Petitioner's red-faced assertion that the phrase "subject-matter" in his special appearance *was a mere slip of the pen?*

It is plain the point is controlled by the Perrine case.

The right of a state court to insist that a special appearance objecting to jurisdiction over the person be limited is well established, and the rule announced in the Perrine case has been of general application as shown by the following citation from Corpus Juris (Vol. 4, p. 1333) :

"Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. Thus a party makes a general appearance by objecting to the jurisdiction of the court over the subject-matter of the action, whether the objection is made by a motion or by formal pleading."

Citing U. S. :

*Fitzgerald etc. Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

*Mahr v. Union Pac. R. Co.*, 140 Fed. 921, (Aff. 170 Fed. 699, 96 C. C. A. 19).

(Citing also Alaska, Minnesota, Nebraska, Ohio).

In addition to the Fitzgerald case cited in Corpus Juris, supra, we find the rule to have been recognized in other cases decided by this court.

*Western Loan & Savings Co. v. Butte, etc. Co.*, 210 U. S. 368: Plaintiff, a citizen of Utah, brought action against defendant, a citizen of New York, in the Circuit Court of District of Montana, contrary to provision of code requiring action to be brought in district where defendant resided. The defendant filed a demurrer setting forth :

"1st, that the court has no jurisdiction of the subject of the action; 2d., that the court has no jurisdiction of the person of the defendant; 3d., that said complaint does not state facts sufficient to constitute a cause



of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible."

The court found that where "the suit is cognizable in some circuit court, the objection that there was not jurisdiction in a particular district may be waived by appearing and pleading to the merits." It held that the filing of the demurrer, *of and in itself*, was a waiver of the objection to jurisdiction of person. Relevant to a contention similar to Petitioner's (Br. Pet. p. 19) that the state practice denied him the right to assert this privilege, this court said:

"So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States Circuit Court, as is shown by the case of *Shay v. Quincy Min. Co.*, (*Ex parte Shaw*), 145 U. S. 444."

Under Section 8610 of the Nebraska Code of Procedure (Br. Pet. p. 21) the right was specifically granted of so specially appearing, and recognized in the cases of *Templin v. Kinsey* and *Stelling v. Petticord*, *infra*. (p. 49) as well as in the case at bar, the Nebraska court said (2nd Opinion, Rec. p. 201) :

"If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas County, *the court would not have acquired jurisdiction over his persons* \* \* \*."

The Nebraska court did not rule that the objection to person was waived because *of the orders*, but because of it being claimed that they divested the court of jurisdiction of *subject-matter*.

In *Thames & Mercy etc. Co. v. U. S.*, 237 U. S. 19, this court sustained a ruling by the lower court that a "special appearance" by demurrer which attacks other than the jurisdiction over the person was a general appearance to the merits, saying:

(Syl.) "The requirement with respect to the proper district for suits upon claims against the United States, made by the Tucker Act of March 3, 1887, (24 Stat. at L. 506, Chap. 359 \* \* \*) was waived where the United States, though asserting in its *demurrer to the petition that it appeared specially*, raised by that pleading not simply the question of jurisdiction, but also that of the merits, such a demurrer being in substance a general appearance to the merits. \* \* \*

"(24) While the government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States, but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of the tax, and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is in substance 'a general appearance to the merits,' and is a waiver of objection with respect to the district in which the suit was brought. (Citations.)"

Again, in *St. Louis etc. Co. v. McBride*, 141 U. S. 127-131, it was held:

"\* \* \* Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different states, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. In *Ex parte Schollenberger*, 96 U. S. 369, Chief Justice Waite said: 'The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of

a personal exemption in favor of a defendant, and it is one which he may waive.' \* \* \*

At this point let us consider the five cases Petitioner claims to have been overruled by the Supreme Court of Nebraska "without mention" in its decision upon the special appearance.

In *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, the plaintiff bank sued defendant Baker together with one Frazier; service was had by leaving a copy of summons at Frazier's usual place of residence in Douglas County, Nebraska. An alias summons was served upon Baker in Buffalo County, Nebraska. Baker answered to the merits which of course is a waiver. Thereafter Baker filed an amended answer in which he set up as a further defense that the court had acquired no jurisdiction because the service on Frazier was bad in that Frazier was a resident of Illinois at the time of purported service on him in Douglas County. (An attempt to avoid a waiver). The court held that the objection to venue could not be set up for the first time in an amended answer and held the objection had been waived by failure to insert it in the first answer. The question of a special appearance including an objection to jurisdiction of subject-matter with that of person was in no wise involved—in fact, no special appearance was ever filed in this case. The case is an authority, however, for Respondent's contention that privilege from suit in a certain county is waived by entry of a general appearance.

*Templin v. Kinsey*, 74 Neb. 614, and *Stelling v. Peddicord*, 78 Neb. 779, were both cases wherein a special appearance limited solely to the court's jurisdiction over the person were concerned. The court held in these cases that it was proper to save the objection in the answer. No question of waiver by incorporating an objection going to the subject-matter was concerned. These cases are nowise in point with the question decided in this case.

*Hurlburt v. Palmer*, 39 Neb. 158, involved the proposition contained in *Baker v. Union Stock Yards Nat. Bank*, *supra*. No special appearance was made in this case—either made or waived. The court merely held that objection to jurisdiction of person could properly be set up in the answer along with defenses to the merits where the objection did not show on the face of the petition as provided by Section 8612 of the Nebraska Code (set out on page 21, brief of Petitioner). The question of waiver by objecting to jurisdiction of subject-matter as well as person in a special appearance was in no wise involved or decided.

*Kyd v. Exchange Bank*, 56 Neb. 557, was another case where no special appearance and motion to quash was in any wise involved. None was ever filed in that case. The question was the right of defendant to object to jurisdiction over his person in his answer for the first time where defect was not disclosed on the face of the petition. The case is an authority in the group of *Hurlburt v. Palmer*, and *Baker v. Union Stock Yards Nat. Bank*, *supra*, that an objection to jurisdiction of person can be properly raised for the first time by answer where the defect does not appear on the face of the petition—a contention which is in no wise concerned in the decision of this case by the Nebraska courts.

In three of these cases *no special appearance was even filed* or concerned and in two the special appearance *was limited exclusively* to objection to jurisdiction of person. Three are authorities only that the objection can be plead in the answer for the first time where the defect does not appear on the face of the petition as provided by Section 8612 of the Nebraska Code—and two that even where the defect does appear it is proper pleading to save the objection in the answer. *In none of them did the defendant attempt to come into court to question the court's jurisdiction over the subject-matter of the action before answer by special appearance or otherwise.*

All these cases involve rules clearly distinguishable from the Perrine rule—indeed have nothing to do with it.

(10) **Privilege Never Claimed.**

*Petitioner never did assert the real privilege of waiver that the Director General orders gave. Whenever he spoke of jurisdiction over the person it was as a condition resulting from the asserted lack of jurisdiction or power of the court, taken away from all courts but those of two places. This position is shown by the arguments at pages 8, 9, 10 of his brief. Since Petitioner never objected to jurisdiction over the person in any different light than that and never did come right out and claim the privilege of venue as a privilege—that question was never before the court. Such a federal right was not asserted and not denied. Petitioner's counsel did not seem to recognize such a right to assert it. As stated above it will not do to say the court had no power to act and therefore on that account argue lack of jurisdiction in sweeping terms over either the subject-matter or the person.*

The difficulty with Petitioner's argument on page 13 of brief is that the court held the appearance being general was more than "equivalent to the service of summons." That phrase was connected by a conjunction and followed by still stronger and broader language to-wit: "*and gives the court jurisdiction over the person of such officer*"—a general appearance and a waiver of venue privilege.

On page 12 of Petitioner's brief two excerpts of the Supreme Court of Nebraska are quoted and the assertion made that "it is apparent these statements are inconsistent." Let us see.

In the last of these statements the effect of joining an objection to jurisdiction of subject-matter with one to person is passed upon, and the filing of such an instrument held to

constitute a general appearance. This motion to quash is to be treated the same as a general demurrer or any other instrument would be. The inquiry was "What was its purpose? What did it question?" If it was broad enough to question subject-matter then it was a general appearance. In the determination of this question what disposition was made of the instrument on its merits is immaterial,—whether it was sustained, overruled or abandoned. The test is in the instrument itself. Its ultimate disposition is another question.

The finding that it was properly overruled because proof of its allegations was abandoned by Petitioner, does not in any way effect the question of whether its being *filed* constituted a general appearance. Such abandonment merely shows a waiver of the objections therein contained.

The excerpts quoted are not inconsistent, but to the contrary are entirely consistent.

The quotation shown on page 25 of Petitioner's brief is made up (as therein shown) of excerpts taken from three different pages of the second opinion of the Nebraska Supreme Court. These, Petitioner has adroitly assembled into one excerpt so as to omit all holdings of the court concerning the effect of the joinder of objection to jurisdiction of subject-matter with that of person. The result, he attempts to lead this court to, is that the Supreme Court of Nebraska never considered the words "subject-matter" as anything but mere surplusage. This is not the fact. The Supreme Court of Nebraska was asked by Petitioner to hold that the five orders of the Director General (set out as part of his motion, page 6, record) limited the jurisdiction of the District Court over the subject-matter of this action. After analyzing these orders, the Supreme Court of Nebraska found they did not limit the District Court's jurisdiction over subject-matter. But this was not a holding that Petitioner did not *question* and ask for a ruling that orders *did* limit jurisdic-

tion of "subject-matter." The court was analyzing Petitioners' objection that the jurisdiction over subject-matter was limited by these orders and found that it was not. The test in whether an appearance is special or general does not lie in the motion being sustainable, nor in the "reasons assigned" being good. The test is whether the objection to subject-matter *was made*.

#### WESCHLER CASE.

Petitioner, at this point on page 14 of his brief tried to use the case of *Davis v. Weschler*, 68 L. Ed. (Adv. Sheets) 5, in support of his very general appearance being distorted into a special appearance, but it does not do it.

The Weschler case is directly in line with us in reasoning. *It permitted the decision of the Court of Appeals to stand upon the question that General Order 18-A did not limit the jurisdiction of the court, but was only a question of venue which was waivable.* The court held that under the narrow facts stated the limited act claimed as a waiver was not sufficient in that case to constitute a waiver. Let us compare that case with the case at bar and see the distinction between that case, wherein there was no waiver, and this, with many waivers clearly made.

In that case the privilege of venue was plainly and seasonably made and at all times insisted upon. But in the case at bar, where the petition did not disclose grounds for such a privilege the Petitioner by special appearance supplied these alleged omissions and placed the pleadings in the position, so far as imparting knowledge, that this question could have been and was challenged by special appearance. However, petitioner, after a permissible and involved challenge, abandoned the same. This was a voluntary surrender. When the answer was filed, a pretended special appearance was filed to be united with defenses on the issue which could not be done because of the previous position taken and abandoned by petitioner.



Nevertheless, assuming for argument's sake, that this was a special appearance and was allowable, after this situation created by Petitioner and abandoned, it was too broad and contained an objection to the jurisdiction of the court over the subject-matter—an affirmative defense like a cross-petition. More than this, after evidence of residence of plaintiff, and place of injury, was admitted by Respondent, Petitioner waived his privilege by not then making a timely objection to jurisdiction over his person, but he proceeded with the trial, *never at any time* objecting to venue or moving a dismissal because of venue, all of which "plainly indicates that he intended (*not*) to adopt the position that the action was brought in the wrong county."

In the Weschler case counsel had a bare statement that a successor to the Director General "appeared" which was very properly construed to mean that he took the position of his predecessor. The objection in the Weschler case was timely and properly made and there was no clear and rational act of intended or constructive abandonment as there was in the case at bar. The language used "even if the order went only to the venue and not to the jurisdiction of the court" does not undertake to overrule a prior decision of this court or the court of appeals in that respect but rather concedes them by not overruling that part and shows the venue privilege is waivable and waived *if facts are sufficient to show waiver*. The language is equivalent to a statement that, "although the order went only to venue," etc., the *facts* were *not* sufficient.

In the Weschler case the issue presented was a clean claim of privilege under Order 18-A, timely asserted under Missouri law, the *validity* of which order was *denied* by the court. In the case at bar the Supreme Court of the State of Nebraska *upheld the validity of the order*, but further held the privilege of venue had been waived in several particulars.

In the Weschler case the act of substitution and appearance of the new agent was a "contemporaneous" appearance to re-assert a pure unabandoned claim of privilege. In the case at bar the first Director General waived absolutely and completely and sought a verdict on the merits alone that would bar a suit in any other jurisdiction.

In the case at bar any substitution was subject to the existing condition and no new substitution nor new trials could wipe out an old waiver of a former trial.

In the Weschler case the court held that when a federal right is asserted no state rule of practice will defeat the right. We purposely paraphrased this holding, by leaving out an important element to call attention to its importance. That phrase indicates that a federal right or privilege shall be "plainly and seasonably made," and we add for paraphrase "*and not abandoned*," under the same reasoning. (In our case the *rule of waiver* applied was not one of local state practice on waiver, but it is one of general practice recognized by this court.)

We all have known that long before this case was appealed no rule of local practice will be tolerated to modify the substance of the Federal Act and nothing was ever done to circumscribe this *law*. The object of Petitioner is perfectly clear. His early successes lead him to think he could win this case on the merits and that he desired to stay and fight the case in the state court and not be confronted with another trial just across the bridge. Therefore, he did not *properly* assert any federal privilege and none was ever denied him. Therefore, this question is not reviewable.

"\* \* \* To become the basis of a proceeding in error from this court to the supreme court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, Chap.

231, Comp. Stat. 1913, Sec. 1214). This means that the claim must be asserted at the proper time, and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (*Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), and upon the question whether or not such a claim has been so asserted the decision of the court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *John v. Paullin*, 231 U. S. 583, 58 L. Ed. 381, 34 Sup. Ct. Rep. 178; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. 137.

"\* \* \* While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which \* \* \* this court can review (*Baldwin v. Kansas*, 129 U. S. 52, 32 L. Ed. 640, 9 Sup. Ct. Rep. 193, *F. G. Oxley State Co. v. Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709), and therefore, for want of jurisdiction, the writ of error is dismissed."

*Atlantic C. L. R. Co. v. Mims*, 242 U. S. 532, 535.

## II.

### PETITIONER NEXT CONTENTS ERROR IN SUBSTITUTION OF JAMES C. DAVIS, AGENT, ETC., AS DEFENDANT.

The only point made is that the Winslow Act was not curative of any action unless it was properly commenced.

The court having jurisdiction of the subject-matter as shown above and the action being transitory, defendant having only the privilege of objecting to venue, and having waived that, the action was properly commenced and pending because of Petitioner not having claimed such a privilege.

The foregoing should end the case and our brief ought naturally to stop at this point, because of the fact that the third (III) division of Petitioner's brief is limited to questions that have been foreclosed and mere trial questions. However, we proceed with a full answer to Petitioner's argument not knowing but that the court may desire Respondent's views upon same points raised by him. Considerable length is given by quoting opinions and extracts to save the time of the court, in turning to them elsewhere, yet so arranged that familiar opinions may be passed over.

### III.

#### **THE THIRD CLAIM PETITIONER MAKES IS THAT THE COURT ERRED IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A VERDICT.**

Under this heading Petitioner discusses five elements, which we will consider as follows, viz:

- A. NEGLIGENCE (pp. 59 to 100):
  - (a) Negligent acts considered (pp. 59 to 71);
  - (b) Petitioner's argument traversed (pp. 71 to 76).
- B. PROXIMATE CAUSE (pp. 76 to 101):
  - (a) Petitioner's authorities considered (pp. 76 to 83);
  - (b) Unanticipated and unforeseen—Respondent's authorities (pp. 83 to 91);
  - (c) Respondent's argument on unforeseen doctrine (pp. 91 to 101).
- C. ASSUMPTION OF RISK (pp. 101 to 107):
- D. INTERSTATE COMMERCE (pp. 107 to 119):
  - (a) Gantry in—(pp. 107 to 114);

- (b) Respondent in—(pp. 114 to 118);
- (c) Question for jury (p. 119).

#### E. ERROR IN INSTRUCTION OF COURT.

As Petitioner barely mentions the claimed error in instruction and advances no reasons for his claim that it was erroneous, this assignment will not be further noted other than to say that the instruction complained of merely informed the jury of the claimed acts of negligence, all of which were sustained by evidence. See instruction No. 4, p. 25 Record).

The other questions will be treated in the order presented by Petitioner. These are trial questions arising under rules of general law and where federal statutes and privileges are not denied. Review of such questions are looked upon with disfavor by this court and the findings of the trial court are not usually disturbed.

This court has often held it is not a court of general review to decide issues of fact.

*Louisville N. & R. Co. v. Stewart*, 60 L. Ed. 989.

*Seaboard A. L. R. Co. v. Duvall*, 225 U. S. 477.

(Syl.) "Questions in a suit under the Federal Employer's Liability Act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8658), which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts involving no construction of the federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court.  
\* \* \*

(515) "Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the railway company to show that, under the federal law, all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the federal statute, and neither directly or indirectly affect

any federal right. Those assignments, therefore \* \* \* will not be reviewed."

*Central Vermont R. Co. v. White*, 238 U. S. 507.

"\* \* \* The case, then, is one in which there is no question as to the interpretation of any provision of the federal act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a case of this sort unless error is palpable; the present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Judgment affirmed."

*Great Northern R. Co. v. Knapp*, 60 L. Ed. 745-751.

See also

*Seaboard Air Line Ry. Co. v. Padgett*, 236 U. S. 668,  
59 L. Ed| 777.

#### A. NEGLIGENCE:

##### (a) Negligent acts considered.

Respondent lost his eyesight through the explosion of a detonator (blasting cap) on a wire furnished him by his employers to use in the course of his employment. This wire was obtained by a fellow servant, who represented the employer. He found it in a coal car, and it was being used under the directions of the foreman when it exploded.

It is a positive duty of the master to furnish to his servants, for the performance of the work required of them, safe and suitable materials, such as a reasonably prudent person would ordinarily use under similar circumstances.

*Texas & Pac. Ry. Co. v. Archibald*, 42 L. Ed. 1188.

18 Ruling Case Law, Mast. & Serv., para. 210.

LeBatt, Mast. & Serv., 2nd. Ed. par. 917.

*Union Pacific R. Co. v. Snyder*, 38 L. Ed. 597.

This duty cannot be delegates to another so as to relieve the master from liability for injuries sustained by reason of a failure to perform it properly.

18 Ruling Case Law, Mast. & Svt. para. 210.

LeBatt, Mast. & Svt. p. 2396 (2nd. Ed.).

*Union Pacific R. Co. v. Snyder*, 38 L. Ed. 597, 601.

*No. Pac. R. Co. v. Herbert*, 29 L. Ed. 755.

*Hough v. Texas & Pac. R. Co.*, 25 L. Ed. 612.

*Balt. & O. R. Co. v. Baughn*, 37 L. Ed. 772, 781.

Where a master fails to furnish safe and suitable material and directs the employee to use certain material for a specific purpose, the master is liable for any injury caused by such material being defective.

*Stanwick v. Butler-Ryan Co.*, 93 Wis. 430.

*Brown v. Todd*, 46 App. Div. 546, 61 N. Y. Supp. 963.

*La Bee v. Sultan Logging Co.*, 47 Wash. 57.

*Griffin v. Boston & A. R. Co.*, 148 Mass. 143.

*Cinn. I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 445.

The master, as a necessary corollary to the duties above recited, is charged with the positive duty of inspection. This duty is well stated in Ruling Case Law, Vol. 18, Master and Servant, par. 212, as follows:

"The duty devolving upon the employer to provide reasonably safe and efficient system for inspecting and testing the instrumentalities of his business is another of the absolute, non-delegable obligations that rest upon him. If he appoint another to perform this duty, the person appointed becomes his agent, and the knowledge of the agent is the knowledge of the principal. Accordingly, a foreman authorized to purchase, inspect and direct the use of lumber for the temporary structure of a bridge which his employer is engaged in constructing is held to represent the master in respect to the duty of inspecting to ascertain if the lumber used is reasonably suitable for the purpose intended, so as to



render the master liable for injuries to other employees due to failure to perform that duty."

See also:

*Union Pacific R. Co. v. Snyder*, 38 L. Ed. 597, 600.  
*Lafayette Bridge Co. v. Olsen*, 108 Fed. 335.  
*Twombly v. Consolidated Elect. Light Co.*, 98 Me. 353.

*Crawford v. N. Y. Cent. etc. R. Co.*, 163 N. Y. 391.  
*Missouri Pac. R. Co. v. McElyea*, 71 Tex. 386.  
*International, etc. R. Co. v. Kernan*, 78 Tex. 294.  
*Lincoln v. Central Vermont R. Co.*, 82 Vt. 187.

Notes: 41 L. R. A. 109, 115, 117, 30 L. R. A. (N. S.) 50.

DUTY OF INSPECTION AND TEST CANNOT BE DELEGATED BY THE MASTER.

Thompson, on Negligence, par. 3791.

*Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127.

*Metropolitan Redwood Lbr. Co. v. Davis*, 205 Fed. 487.

Ruling Case Law, Vol. 18, Mast. & Ser. par. 73.

EMPLOYEE MAY ASSUME MASTER HAS COMPLIED WITH HIS DUTY TO FURNISH SAFE MATERIAL PROPERLY INSPECTED.

18 R. C. L. Mas. & Ser. par. 91.

*Balt. & O. R. Co. v. Baughn*, 37 L. Ed. 772, 781.

*Union Stock Yards Co. v. Goodwin*, 57 Neb. 138 (Syl. 9).

*Cinn. I. St. L. & C. R. R. v. Roesch*, 126 Ind. 445.

*Heinz 1. Knisley Bros.*, 185 Ill. App. 275

ACTUAL KNOWLEDGE BY MASTER OF DEFECT NOT NECESSARY.

26 Cyc. 1146.

*Houston v. Brush*, 29 Atl. 380.

WHERE MASTER FAILS TO INSPECT, CHARGED WITH NOTICE OF EVERY DEFECT AN INSPECTION WOULD HAVE REVEALED.

LeBatt, Mast. & Ser. par. 1059 (2d Ed.).

*Libbey, McNeill & Libbey v. Cook*, 222 Ill. 206.

NO DEFECT IS LATENT WHICH IS DISCOVERABLE BY EXERCISE OF DUE CARE.

*Libby, McNeill & Libby v. Cook*, 123 Ill. App. 574; affirmed in (1906) 222 Ill. 206.

*Western Invest. Co. v. McFarland*, 166 Fed. 76.

*Feeney v. York Mfg. Co.*, 189 Mass. 336.

*Ferris Press Brick Co. v. Thompson*, 124 S. W. 499.

*Sack v. Dolese*, 35 Ill. App. 636; affirmed (1891) 137 Ill. 129.

"A defendant cannot avoid its liability by shutting its eyes to its obligation to maintain a reasonably safe place."

*Burnes v. Kansas City, Ft. S. & M. R. Co.*, 129 Mo. 41, 31 S. W. 347.

"*Inspection*" means more than "*looking*"—the two words are not synonyms. And the authorities so hold. LeBatt, Master & Servant, (2nd. Ed.) par. 1063, states the rule as follows:

"Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indication as to actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a mere visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrument is composed." (Citing several cases under footnote 5.)

As defined in Words and Phrases (p. 1104):

"The 'inspection' required of an employee's place to work by his employer is not necessarily limited to visual examination, but is ordinarily understood to embrace such tests and examination as are proper to determine fitness, and to include an inquiry into safety, efficiency

*and quality not resting on visual inspection alone."*  
(Citing *Pettersen v. Rahtjen's Amer. Composition Co.*,  
111 N. Y. Supp. 329, 332.)

*Union Stock Yards Co. v. Goodwin*, 57 Neb. 138, is a case wherein Goodwin, plaintiff, a brakeman for defendant, while attempting to set a brake on a string of six cars was injured by falling from the car caused by brake wheel coming off because the nut thereon was so large that it slipped over its threads, said:

*"To inspect a car brake may require more than a simple glance at it. Such a test must be applied as would probably reveal a defect if one existed; and the neglect of a car inspector to make such a test is evidence of negligence."*

In the case of *G. H. & S. A. R. So. v. Cora Lee, et al*, 27 Tex. Civ. App. 279, a case wherein a brakeman was killed by a fall caused by a defective stirrup, the nut on one end being missing, the court said:

*"But the evidence does show that by looking or feeling under the car at the place where the nuts, which would securely hold the stirrup in position, were screwed on, the absence of the nut and insecurity of the stirrup could have been ascertained. This was not done. While this would have been practicable, the inspectors say it would have been inconvenient, and that they made such an inspection as was usual and customary, and as was made by other railroads under like circumstances. The law will not balance human life against the inconvenience of an inspection reasonably necessary for its preservation, nor excuse one company from the duty it enjoins because other companies may have been remiss in their duty. After all, whether a proper inspection was made was a question of fact for the jury."*

In older decisions some courts excused a failure to inspect and test simple tools when purchased by the master from a reputable maker or dealer, where no circumstances, such as their passing through a fire, etc., had arisen. Most

courts and text writers, however, are breaking away from this exception as shown by the following authorities:

R. C. L. Vol. 18, Master and Servant, par. 75.

26 Cyc. p. 1140.

However, that old doctrine was never extended to a case where the so-called "simple tool" was purchased for a use other than that intended by the manufacturer or for which sold by a reputable dealer. To illustrate: Had Petitioner gone to a reputable dealer and purchased the wire found by Ed in the coal car as *binding wire* the fact that it was purchased from a reputable dealer would be no excuse. When he purchased the wire, the presence of the cap upon the wire would have been notice to him that it was more than binding wire and that it was not intended for use as such. If the reputable dealer could not inform him as to the identity and purpose of the cap upon the wire and he was unable to ascertain by inquiry, inspection or test as to its true properties—he would not be warranted in authorizing its use as binding wire—and the fact it had been purchased from a reputable dealer would be no excuse.

Where second hand materials are not obtained by the master from a reputable dealer but from questionable sources to which materials are appended, or contain other matters, the identity of which matters he has no knowledge of, the positive duty of inspection and test becomes more incumbent upon the master and is still more imperative as the place of its procurement becomes less and less "reputable."

*Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226, where a rag and paper sorter was injured by poisonous material brought from a hospital, the court held:

"We cannot see how defendant can construct any reasonable theory of escape from the wrong done the plaintiff. If the foul and poisonous material was collected by agents for whose acts it is responsible, then it should answer to plaintiff for the consequences. And if the

material was collected without defendant's knowledge or authority, then the jury has found that common prudence would have dictated an inspection thereof before handing it over to plaintiff for sorting. And if the business was such that such an injury as happened to plaintiff was likely to unavoidably follow, then it was defendant's duty to have warned the plaintiff of the danger, or to have taken precautions against such consequences."

It has been held (*Delaney v. Frammingham Co.*, 202 Mass. 359) that where a second hand barrel has been procured by the master which he directed to be filled with hot tar and the only inspection made was by defendant's superintendent to discover whether there was any water in the barrel which might have injured the tar; that the explosion of the barrel because of its having been previously used for naphtha rendered the master responsible for resulting injuries to an employee. The court held that an inquiry should have been made as to what the substance (naphtha) contained in the barrel was and what its properties were when hot tar was poured upon it.

In *Gummerson v. Kansas City Bolt and Nut Co.*, (Mo.) 171 S. W. 959, plaintiff was injured while working in close proximity to a power hammer by a strong acid or lye flying into his eyes from the end of a piece of old, dirty and filthy pipe which was being flattened. The evidence showed the master to have procured second hand pipe from questionable sources containing questionable substances. This old pipe was first flattened by the power hammer, then cut into pieces and melted up and recast into the master's products. The pipe was not inspected and nobody knew what the substance in it was nor was any effort made to ascertain its identity or properties. The master was held negligent for failure to perform his positive, non-delegable duties and a verdict for plaintiff sustained. The situation in this case and the case at bar are similar.

In *Monarch Tobacco Co. v. Northern*, (Ky.) 124 S. W. 350, a second hand steam radiator had been purchased and upon steam being placed therein exploded. The master was held liable for failure to inspect it.

In *Vaughan v. Chicago Junction R. Co.*, 156 Ill. App. 364, it was held that the duty to inspect old, rusty and worn out parts placed in machinery is more urgent and necessary than required of new materials. Judgment affirmed in 249 Ill. 206, 94 N. E. 40.

In *Atlanta Coco Cola Bottling Co. v. Denneman*, 102 S. E. 542, the master was held liable for the defects and weaknesses in second hand bottles which were originally purchased by some bottling concern from persons unknown to defendant.

The negligence under this rule becomes more culpable when the external appearance of the material to be furnished to the employee is such as to put the master, or his vice-principals, upon inquiry.

LeBatt, Master and Servant, par. 1061 (2d. Ed.).

It is admitted in the answer that no inspection was made.

In the case of *Laurino v. Donovan, et al*, 173 N. Y. Supp. 619, a fellow employee (while cleaning master's premises) found one of these detonators with wire attached thereto in coal. He attempted to remove the detonator when it exploded, injuring plaintiff, a fellow workman. None of the workmen knew what the detonator was. Held that as it was found in employer's coal and might have been put in the furnace causing explosion and might have injured somebody, it was the fellow employee's duty to acquaint the employer with the fact of finding same and his failure to do so was negligence for which the employer was liable.

If the court in that case found it was negligence for the fellow employee not to show it to the master "because it might be put in the furnace causing explosion and injure

somebody"—what then will we say about the duty of Ed the vice-principal, when he *knew as a matter of fact that it was to be used as an instrumentality or piece of material in the due course of the employment of himself and his fellow workmen?*

It is true that above case arose under the New York Workmen's Compensation Law and that perhaps a finding of negligence was *obiter dictum*—but the fact remains that the court as a matter of fact did so find that it *was negligence*—at least giving us flatly to understand how they construed the fellow-servant's failure to properly act.

Applying these rules to the case at bar it is apparent that the master was guilty of culpable negligence. The master not only failed to comply with the positive duties of furnishing safe materials and to properly inspect and test such material but omitted and neglected to perform this duty under the specific circumstances presenting themselves having regard for difference in ages and experience which made these failure gross negligence.

Ed recognized he did know what it was and that he was incompetent to inspect or test. That would not relieve the master, but shows that a boy would know less and relying on proper inspection by superiors and with no knowledge as to its place of procurement would go on using what was given him for use. Under such circumstances *it was then the duty of both Turner and Ed to discard the wire rather than to pass it on to employees for use—rather than pass it to a boy who would naturally take it in a spirit of reliance.* John, a mere boy, would not hesitate when a foreman and vice-principal accepted it. But as to the master, chargeable with a duty of overseeing, the cylinder being on the wire, created a specific circumstance putting him and his vice-principal upon inquiry. The rule under such circumstances is stated by LeBatt, Mas. and Ser., para. 1061 (2d Ed.):



"Specific circumstances putting an employer upon inquiry as to the condition of instrumentalities—a. *External appearance of instrumentality*.—If any conditions visible upon a superficial examination indicate that there may be defects, only discoverable by a closer inspection, it is the duty of the employer to make such an inspection. This rule is sometimes applicable so as to charge him with negligence in failing to examine some particular part of an instrumentality, although the visible indications of danger were confined to other part."

In Ruling Case Law (Vol. 18, Mas. & Ser., (2d. Ed.) para. 73) the rule is announced, in the following language:

"The employer is bound to have an inspection made wherever the discovery of the danger requires technical knowledge not possessed by the employee, or where the danger is concealed and the employee has no adequate knowledge to inspect for himself."

We respectfully urge the proposition that the defendant in furnishing this wire did not comply with the positive duty to furnish safe materials to his employees and we also contend that the employer absolutely failed to comply with the positive duty of inspection and test which was incumbent upon him.

The mere glance of Ed O'Hara and Turner was not an inspection. Brains and intelligence must go with the look. The master cannot say that because the foreign matter appended to the material is something that his "inspector" knew nothing about, he has fulfilled his duty of inspection. The result attempted to be obtained by inspection is to ascertain the fitness for use of the material for the purpose of rejecting the unfit. This cannot be accomplished unless the master inspects for action and not for mere optic exercises.

Were the rule otherwise, then all a master need do is to purchase wrecked tools, appliances and materials and place any incompetent cheap workman in charge of inspection

who would "bless" it all with a bath of human vision and responsibility would end. Suppose a barrel is needed for water and a call is made on the "inspector" for one. The "inspector" fishes one out—baptizes it with one ray of human sight, sees some unknown substance sticking to inside and gives the barrel to the gang. Responsibility is ended, because the seer saw. Water from this barrel poisons the men. Suit is brought and the "inspector" is produced by the defendant, takes the stand, and testifies he didn't know that the substance in the barrel was poisonous. Thereupon counsel for defendant moves for a directed verdict. Would the court sustain this motion? Would the court answer: "By 'inspector' we mean a man who is competent to inspect and test these things, and KNOWS whether they are fit for use or not. We will not permit human life to be jeopardized by the master's elevation of ignorance. If the defendant chooses to select the materials for his workmen from questionable sources then the master shall not be heard in a court of justice to advance the explanation that he procured rubbish and furnished a man to "inspect" who was utterly incompetent to know and who in fact did not know and says he did not know what he was looking at—used it anyway—that because they did these things he shall be excused from liability." Would the court put the stamp of approval upon such a doctrine? Would the courts put a premium on ignorance? *The duty is absolute.* The master must furnish such material for the use of his employees as a reasonably prudent man would do under like circumstances. Whether or not he has complied with his duty and the correlated duty of inspection and test is a question of fact for the jury under the peculiar circumstances of each case. This court will not, as a matter of law, hold that the defendant is not liable in furnishing this wire, obtained from a coal car, and negligently "inspected" by one, and uninspected by another, of the only two superiors on the job. The court will not hold that they be permitted to furnish the same to this boy and exonerate the principal from all liability. When the defendant fur-

nished this wire to plaintiff without inspection and test, or by an ignorant unknowing glance, he rendered himself liable for all resulting injury occasioned thereby.

In view of the admissions and affirmative proof on neglecting to inspect and test the doctrine *res ipsa loquitur* is not necessary to urge in the sense of proving negligence already directly shown. However, the holdings of the courts where this doctrine is necessary to be resorted to are helpful in emphasizing the unrelenting insistence of the courts that the master perform these duties and that any failure so to do constitutes negligence. For this purpose we cite the following cases (a few of many) wherein the doctrine has been applied strictly where injuries have resulted from defective materials and the master's failure to show proper inspection and test:

*Tyndall v. N. Y. Cent. & H. R. R. Co.*, 141 N. Y. Supp. 879.

*Ridge v. Norfolk Sp. R. Co.*, 167 N. C. 510.

*Atlantic Coco-Cola Bottling Co. v. Denneman*, 102 S. E. 542.

*Sullivan & Reed Foundry Co.*, 207 Mass. 280.

*Wyldes v. Patterson*, 31 N. D. 282.

*El Paso Foundry & Mach. Co. v. De Guereque*, 46 Civ. App. 86.

*Metropolitan Redwood Lbr. Co. v. Davis*, 205 Fed. 486.

*Duran v. Yellow Aster Min. & Mill. Co.*, 181 Pac. 395 (Cal.).

*Wiles v. Gt. No. R. Co.*, 125 Minn. 348.

*St. Louis, I. M. & S. R. Co. v. Holmes*, 88 Ark. 181.

*Galveston, H. & S. A. R. Co. v. Harris*, 48 Tex. Civ. App. 434.

*Callahan v. New England Tele. & Tel. Co.*, 216 Mass. 334.

*Heinz v. Knisley Bros.*, 185 Ill. App. 275.

*Miller v. Mo. & K. Tele. Co.*, 141 Mo. App. 462.

*The Ocean S. S. Co. v. Matthews*, 86 Ga. 418.

*Houston v. Bush*, 66 Vt. 331.

*Martinkovics v. Lehigh Coal & Nav. Co.*, 154 N. Y. Supp. 178.

*Posey v. Scoville*, 10 Fed. 140.

(b) Consideration of Petitioner's argument of negligence.

Petitioner, at page 31 of his brief, directs attention to the Iowa Workmens' Compensation Act (Rec. 16) and claims the Federal Employer's Liability Act is superseded by it, as alleged in his answer (Rec. p. 18). No assignment is made on this point; nor does Petitioner point out how this action is controlled or in any way influenced by the Iowa Act. It has often been held that such state compensation acts do not supersede, nullify nor even qualify the federal act, and any provisions thereof attempting so to do is unconstitutional and void.

*Taylor v. Taylor*, 232 U. S. 363.

*Mich. Cent. R. R. Co. v. Vreeland*, 227 U. S. 59.

Petitioner, on page 39 of his brief quotes a statement of Miss Gray, a stenographer, who produced a typewritten alleged statement of John O'Hara upon a contradictory statement on how the accident happened in which they had him tapping the cylinder to get powder out. John denied that he made those statements and the controversy was a jury question, not at all proper to be here. On cross examination we showed Miss Gray was an assistant to a legislative agent of the Union Pacific, that she had delivered her shorthand notes to the railroad company and also her typewritten sheets and that neither the notes, paper nor typewriter had been under her control since doing the work; we showed that Mr. Van Noy was an employee of this railroad and from the whole record the jury sustained Respondent upon this controverted question.

What was offered by Miss Gray is positively contradicted not only by Respondent, who described in his testimony exactly how the cylinder on the wire was tapped or struck in attempting to straighten the wire. It is also contrary to the evidence of defendant's witness, Berg who said Respondent hit it with a hammer. Berg probably thought that was how it was from having seen a hammer used about that time. This contradicted both Respondent and Miss Gray—it was a controversial jury question—properly submitted to the jury.

Petitioner at page 41 of his brief quotes expert testimony (subject to acceptance or rejection by a jury) on how safe these caps were made and how seldom they explode accidentally—but this was a jury question also, on controverted evidence as there was an abundance of evidence that made it a controversy proper for the jury to determine. First, we have testimony it did explode and supporting evidence of extreme danger (see statement of case, p. 6).

At page 51 of his brief Petitioner again asks this court to decide a jury question. He goes further than asking a decision on disputed questions of fact. He goes to the extreme of asking this court to draw conclusions—based upon *no* evidence or even any reasonable inference or deduction therefrom. His argument would not be proper even to a jury because so utterly without support by the record.

He asks this court to say as a matter of law that the ten or twelve inches of wire (plus an undetermined crumpled amount) was too short for use in binding cloth on the one inch cable.

He then urges that this wire was neither directed to be or being used in the work. But the testimony is clear and uncontradicted that the foreman (as he admits) had directed its use and, further, that it was being so used. But one cloth had been bound on the cable at the time of the injury and Respondent was preparing this wire to be used in bind-

ing on the second cloth. It is clear that the wire was being used in the work and that the foreman had specifically ordered its use.

Continuing, Petitioner argues that there is nothing in the record to show that Ed knew or should have known that Respondent intended to straighten the wire or make use of it. The answer to this is, first, that it is immaterial what was going on in Ed's mind, and, second, if material, he had no reason to suppose Respondent would not use it, but to the contrary had every reason to know that Respondent would use it as John did—especially in view of the orders given by the foreman to conserve the wire.

Petitioner then argues that Ed *intended* to throw the remaining wire away after cutting off the second portion because Ed "had no further use for it." This is down-right deception. Petitioner several times inquired as to Ed's unexpressed mental intentions but the trial court properly ruled such inquiry immaterial and as not communicated to the Respondent—not binding on him. In the first place Ed never testified that he intended to throw the wire away; in the second place he never verbally expressed such an intention to Respondent or any one else; in the third place his conduct clearly indicated a contrary intention. Having cut the second piece off, Ed carried both that piece and the portion given Respondent some 20 feet to where Respondent was working and there gave him the wire. This conduct would not indicate to a third party an intention to discard it—but it was rather an indication to the contrary that he intended it should be preserved. The process involved in this argument of Petitioners' is that he seeks to first establish an intention (with no basis therefor) in the mind of Ed; having established (?) that intention to charge Respondent with a knowledge of it, even though all actions indicated quite the converse, he would build up his theory of idle curiosity. Everything that was said and done indicated

clearly that the foreman's orders to conserve the wire still stood and were being explicitly followed. That is why Respondent continued on in the duty of preparing it for use. But these are all jury questions.

From these false premises Petitioner argues that Respondent was a mere volunteer. In a further attempt to establish the "volunteer" theory Petitioner urges that *had* the wire been thrown away by Ed, Petitioner "would have understood from *that fact* that his uncle was discarding it, that it was unfit for use." But again, it is seen the argument is based upon premises that never existed—Ed did not throw the wire away—so any conjecture as to what *might* have been the situation *had* Respondent picked up *discarded* wire is wholly immaterial and irrelevant. This case was not tried or decided on *assumed* situations, but upon the situation actually present. Whether Respondent would be called upon to have interpreted an act of throwing it away as being Ed's opinion that it was "unsafe for use," or too short for use or what not, is entirely foreign to the record. If such an act would have suggested its unsafety, Respondent did not *even* have the benefit of that suggestion.

The statement that plaintiff had been standing idly by—just waiting—and had done nothing to aid in the work until he received this wire is unsupported by the record. As a matter of law it is immaterial whether he had or not. As a matter of fact the statement is not true. The record specifically shows that Respondent had assisted in getting and cutting the cable and that he, as well as all members of the crew were busy performing this duty at which all five men were engaged.

Petition seeks to make a point in the claim that Respondent "asked for" the cap. Again, as a matter of law it is immaterial whether he did or not, but as a matter of the record there is no basis for such statement. Nobody testified he



asked for it or that he was asked to take it. The testimony is that the cap was handed to him and he took it as anyone would under such circumstances.

The record clearly discloses that plaintiff was injured while acting within the scope and course of his employment by the actionable—yes, culpable—negligence of Petitioner and his agents.

He undertook a task knowing he had no sufficient materials on hand, and instead of procuring materials from a reliable source he elected to order the gang to find it. This wire was procured from an empty coal car—it was mere rubbish. Appended to it was an article of sufficient suspicion that had it been procured from a reputable dealer the master would have been placed upon notice to investigate as to its identity. The foreman, standing in the shoes of the master, passed it for use with a mere glance; the servant who procured it (also standing in the master's shoes) likewise passed it without inspection. It was supplied to Respondent as a suitable material for the specifically directed use. Respondent not knowing where it was procured or that it was uninspected, but believing, as he had a lawful right to do, that it was safe and reasonably proper for the use furnished, was injured by its exploding. It is hard to conceive of a situation where an inspection and test and inquiry are more urgent than in cases like the case at bar, where rubbish, gathered from a suspicious place and having suspicious elements is procured by the master. If under these circumstances the master was not bound to inquiry and inspection and test—or to the alternative duty of discarding the material instead of passing it for use—then these rules are meaningless. With the master's admitted knowledge of these circumstances, and his admitted lack of inspection, and his admitted furnishing and ordering its use, the Petitioner became guilty—as a matter of law—of culpable negligence. There was no question of fact for the jury—the

master admitted the circumstances—and the jury could not have otherwise found but that the positive duties were violated.

The facts are the instruction leaving this question to the jury was more favorable than Petitioner was entitled to have under the law. But since the question went to the jury and they found against him the cases on page 43 of his brief are not in point, because they all apply to cases where there was no evidence of negligence.

#### B. PROXIMATE CAUSE:

##### (a) Petitioner's authorities considered.

Pages 44 to 50 of his brief are devoted to a contention that the evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff. In support of his contention he cites several cases from an analysis of which it is clearly shown that all but two have no application to the case at bar:

The first case cited, *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243 (Br. Pet. p. 44), in which plaintiff, switchman, standing on the running board of engine was injured by coming in contact with the sill of a car. It appeared that this car had no drawbar or automatic coupler and that had it been so equipped the sill of the car would not have come in contact with plaintiff. "The only negligence charged in the complaint was a failure to have the car equipped, at the end struck by the engine, with an automatic coupler and drawbar of standard height as required by the safety appliance acts, and there was no attempt to prove any other negligence." This court disposed of the case on the ground that the safety appliance act was not enacted for the benefit of any persons other than those coupling and uncoupling cars—and that plaintiff, who was neither coupling or uncoupling this car and having no intention so to do was not one of the persons for whose benefit the law was enacted.

*Lang v. N. Y. Cent. R. R. Co.*, 255 U. S. 455 (Br. Pet. p. 45), involved the identical question presented in the Conarty case, under similar facts, and the Conarty case was specifically adopted and followed.

Neither of these cases announce any rule applicable to the case at bar, as Respondent was one of the class of persons for whose benefit the courts have required the master to perform the positive, non-delegable duties involved in the case at bar.

*Prior v. Williams*, 254 U. S. 43 (Br. Pet. p. 45), was a case concerning only assumption of risk. We have digested this case at page 101 *infra*.

*State v. Ellison*, 196 S. W. 1088, (Br. Pet. p. 46): Plaintiff, an engine foreman, was injured while attempting to signal an engineer on another track to stop. The sole negligence involved was the failure of this engineer to pay attention for signals causing plaintiff to step on another parallel track to better attract his attention. In so doing he stepped in front of another engine on the parallel track and was injured, without fault of those operating the engine striking him. The sole question involved the failure of the first engineer to pay attention for signals. It was held that no recovery under such circumstances could be had as the first engineer's negligence was not the proximate cause of the injury by the second locomotive on the other track. This was a case of an efficient intervening cause, even if the first engineer was negligent.

*Great Northern Ry. Co. v. Wiles*, 240 U. S. 444 (Br. Pet. p. 47). In this case the injury was caused by the plaintiff's own negligent failure to perform his positive duty of protecting the rear of the severed train. He knew a passenger train was close behind and neglected to get out and flag it. The passenger train crew was not negligent. He lost his life because he, himself, neglected to do the very thing he was hired to do to save life.

*Milwaukee, etc. Ry. Co. v. Kellogg*, 94 U. S. 469 (Br. Pet. p. 47) is, as shown at page 97 hereof, an authority in favor of Respondent.

*McGill v. Mich S. S. Co.*, 144 Fed. 788 (Br. Pet. p. 47): An appeal was prosecuted from a decision against recovery for an explosion occasioned by drilling in an oil tank in a gas-filled space above the oil—a lighted candle being used by the driller. Everybody knew the oil would not flash, but few knew the gas given off would explode if mixed in a certain proportion with air. (We eliminate holding on steamship limitation and third party liability). The lower court held against plaintiff. The appellate court reversed the case: that court holding that the plaintiff drilling knew the gross fact that there was oil in the bottom of the tank and space above, but that he could not be charged with scientific knowledge that that space was filled with an explosive combination and the employee could not, therefore, be charged with negligence or assumption of risk in lighting his work with a candle; that, on the other hand (applying the principles in the Kellogg case) the officers of the steamship company ought to have foreseen more than the servant and that probably an explosion of gas might occur from the work of the employees; that the superintending engineer was its officer to inspect the work; that he ought to have foreseen that an accident was likely to occur; that the injury was the natural and probable consequence of his act. The case is clearly an authority in favor of Respondent.

*Western Union Tel. Co. v. Hall*, 287 Fed. 297 (Br. Pet. p. 47) is not in point. This was a suit in which recovery was sought for mental anguish for failure to deliver a telegram. It went off on the rule of law in federal courts that no recovery would be allowed for mental anguish even though accompanied by pecuniary loss, quoting the parts of Kellogg case, which case as shown (page 97 hereof) is an authority for our contention.

*Bryant v. Beebe-Runyan Co.*, 78 Neb. 155 (Br. Pet. p. 47). The proximate cause, as found by the court, was clearly the negligence of plaintiff who voluntarily and knowingly placed himself in a position of danger between two other trucks and operated his truck at such speed and so close to his fellow workmen's trucks that he ought to have expected injury in the event a truck was stopped quickly for any cause. Plaintiff was injured by reason of his own affirmative negligence. This case merely illustrates that the rule works both ways—that a *plaintiff* as well as a *defendant* may expect injuries to follow negligent acts.

*Kitchen v. Carter*, 47 Neb. 776 (Br. Pet. p. 48) excuses the master in event the injury is caused where "*some new efficient cause intervenes* not set in motion by him and not connected with but independent of his acts." There was no intervening cause in the case at bar, or none claimed. Respondent's injury followed directly from an explosive being attached to wire furnished him to use as binding wire—and from the master's failure to perform his positive, non-delegable duties of furnishing safe material and inspection and test.

*Williams v. Hines*, 189 N. W. 623, (Br. Pet. p. 47) follows the efficient intervening cause rule in *Kitchen v. Carter*. An employee suffered a broken collar bone by negligence of employer on February 19, 1918; on April 5, he was discharged from the hospital; on September 2nd he resumed his employment as brakeman and worked until October 4th, when he was suddenly taken ill with bronchial pneumonia and died October 13th. All physicians agreed the kind of pneumonia from which deceased died was a *germ* disease and not traumatic pneumonia which develops within a few hours from effects of injuries. "An injury, in order to be the proximate cause, must be the thing that directly causes the subsequent disease, and not merely a condition enabling it to operate independently." The evidence failed to show death caused by injury or in any manner traceable to it.

*Merkouras v. C. B. & Q.*, 101 Neb. 717 (Br. Pet. p. 47). (opinion by divided court): Plaintiff and a fellow workman were laying up track for twenty minutes wrestling. They were directly in line with the approach of cars they knew were to be moved. Plaintiff's foot was injured by being run over when these cars were advanced. It was held the railroad company owed plaintiff no duty to anticipate such wanton negligence on the part of plaintiff; nor such improper use of the tracks—that the tracks of and in themselves constituted a sufficient warning. There was *no* negligence on the part of the defendant—the closest negligence alleged being failure to observe a rule which a divided court held was inapplicable to the situation presented.

*New Orleans v. Harris*, 247 U. S. 367 (Br. Pet. p. 48): Plaintiff sought a recovery based solely on a state law providing that, in actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Accordingly plaintiff introduced no evidence of negligence, but proceeded upon the theory announced in the state statute that it was rather for the defendant to show no negligence. This court held the statute to be inoperative insofar as actions brought under the Federal Employer's Liability Act are concerned, and that the burden of proof was upon the plaintiff. No evidence of negligence having been introduced and the statute being inoperative, the judgment rendered in favor of plaintiff was reversed and remanded for further proceedings not inconsistent with the opinion. The case is an authority only that negligence must be proved by plaintiff—a proposition conceded by us and in nowise involved in this action where there was an abundance of affirmative proof as well as admitted negligence.

*Nitro-glycerine Case*, 15 Wall. 524 (Br. Pet. p. 48) is way off the mark. That action was not under the strict law of Congress making one liable for defect or insufficiency of

material, or any negligence of agents and servants, but concerned a mere licensee upon premises. Well-Fargo Company was a carrier—a package was given it for transportation, nothing unusual about its presence. No law required them to obtain information on contents or to inspect and test the package or its contents. It came in usual course of business. Oily contents were leaking and the company was attempting to open the package to fix it for forwarding. It exploded. Defendants repaired the premises of the landlord from whom they rented, but it was held they were not liable to other tenants of the building. Of course, nothing was said of the liability of the shipper, but as to the carrier there was no act of negligence shown. At every step it was doing its duty and no negligent act was in evidence. This co-tenant action—this sort of landlord and tenant case—cannot be worked into an authority in the case at bar to show that there was no negligence of agents and servants, or insufficiency or defect in materials and appliances under this great act of humanity passed by Congress.

*Cleghorn v. Thompson*, 62 Kan. 727 (Br. Pet. p. 49) was overruled by the Kansas court in 187 Pac. 661. Insofar as the citations from Thompson and Pollack are concerned they are not in point with this case. In the case at bar the accident did not occur while Petitioner was "proceeding in a lawful business, exercising reasonable care," but from his direct negligence. Nor can the consequences be "ascribed \* \* \* to an act of God," but they are directly chargeable to Petitioner and his "not exercising reasonably care" or, indeed, any care at all.

*Southern Pacific Co. v. Berkshire*, 254 U. S. 415 (Br. Pet. p. 50) announces the rule that the master is *not an insurer*. Petitioner merely seeks to emphasize this rule. We do not dispute the rule.



We fail to see how any or all of these cases even tend to establish the proposition Petitioner cites them as supporting, viz: "the evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff." There is certainly no applicability to the case at bar of the rule announced in *Southern Pacific Co. v. Berkshire*, *supra*, that a master is not an insurer; nor the rule in the overruled case of *Cleghorn v. Thompson* that a master while exercising reasonable care is not liable, because, in the case at bar, the master was not so proceeding. Nor the rule in *Kitchen v. Carter*, *Williams v. Hines* and *State v. Ellison*, to the effect that where an efficient cause intervenes which, self-operating, causes the injury, the master will be excused does not apply, as no cause—efficient or otherwise—intervened in the case at bar. Nor the rule in the *Conarty* and *Lang* cases where plaintiff was not one of the persons protected by the safety appliance acts because in this case Respondent was one of the persons to be protected by the master's performance of his positive duties. Nor the rule in *Great Northern v. Wiles*, *Bryant v. Beebe-Runyan* and *Merkouras v. C. B. & Q.*, that where the injuries occur through the plaintiff's own negligence the master is not responsible. Nor the rule in *New Orleans v. Harris*, that proof of negligence is an affirmative proposition to be established by plaintiff under the Federal Employer's Liability Act and that a state statute creating a *prima facie* case is inoperative in actions brought thereunder. There was no statute involved in the case at bar by which we sought to establish negligence, but to the contrary the proof of negligence was in the violation of the common-law positive duties incumbent upon the master. Certainly the co-tenant law in the Nitro-glycerine case has no applicability to the case at bar—especially so when in this case we have shown culpable negligence.

The only authorities Petitioner cites which are pertinent to the case at bar are the two upon the anticipation and

unforeseen doctrines—the case of *McGill v. Mich. S. S. Co.*, and *Milwaukee etc. Ry. Co. v. Kellogg*,—and, both these cases are authorities that Respondent ought to recover, rather than that he ought not. That no confusion result we will fully discuss these two doctrines (unforeseen and unanticipated), and will cite the principles and authorities which are controlling upon this phase of proximate cause.

(b) UNANTICIPATED AND UNFORESEEN.

The accident and resulting injuries to respondent flowed in an unbroken chain directly and without efficient intervening cause from petitioner's negligence. Therefore, such negligence constituted the proximate cause of the accident.

Petitioner at pages 44 to 50 of his brief, contends the accident was not proximately attributable to his negligence for the reason claimed that he could not anticipate nor foresee the results.

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Per *Milwaukee etc. Co. v. Kellogg*, 24 L. Ed. 256, 259 (followed extensively as shown by over eight pages of Roses notes including several cases involving breach of master's duties similar to case at bar.)

*Chicago etc. R. Co. v. Moore*, 36 Okla. 450.

*Konig v. Nevada etc. Co.* 36 Nev. 181-210.

*Young v. New Jersey etc. Co.*, 46 Fed. 162.

*Swain v. C. R. I. & P. Co.*, 174 N. W. 384.

*Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39.

*Fort Worth etc. Co. v. Cobell*, 161 S. W. 1083.

*Bishop v. Victor Chem. Wks.*, 209 Ill. App. 220.

*Collins v. Pecos & N. T. Ry. Co.*, 212 S. W. 477.

*Schabow v. Wisconsin Traction Co.*, 155 N. W. 951.

**According to some authorities the unforeseen doctrine has no application in a case where there is no intervening efficient cause.**

"This rule is also said to be no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and in which such consequences, although not probable, have actually flowed in unbroken sequence from the original wrongful act." Ruling Case Law, Vol. 22, p. 121.

*Gilson v. Dela. & Hudson Canal Co.*, 65 Vt. 213.

**Others that the rule is used only to extend liability in cases of wilful or malicious acts.**

"Proximate consequences are regarded, in case of mere negligence, as covering only such direct and immediate results as occur without the intervention of any outside or independent agency, while in case of wilful or malicious acts, consequences which might have been reasonably expected or foreseen are deemed to be proximate, though outside and independent agencies do intervene." (Note, 45 L. R. A. 87).

**All authorities are agreed upon the following principles: All consequences which naturally ensue without intervention of some independent agency are deemed foreseen.**

"\* \* \* Thus it is laid down in many cases and by leading text writers that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or the wrongful act, and that it was such as might, or ought to, have been foreseen in the light of the attending circumstances. This results from the principle that one who is guilty of negligence is deemed to have foreseen, and is liable for, all consequences which may naturally ensue therefrom, without the intervention of some other independent agency, although in advance, the actual result might have been improbable. \* \* \*." (Vol. 22, R. C. L. 119).

**Negligence having been established the doctrine is never applied to the consequence.**

"It is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault, such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could have foreseen the particular results which did follow. \* \* \* The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar the defendant would be liable. \* \* \*" (Vol. 22, R. C. L. 125; *Tex. & Pac. R. Co. v. Carlin*, 111 F. 777.

In case of *Evansville Hoop & Stave Co. v. Bailey*, 84 N. E. 549, the court held:

"A person is liable for injuries resulting from his negligent act, if they are the natural, though not inevitable result thereof, or such injuries as are not ordinarily likely to ensue therefrom, though he may not have been able to foresee them.

"It is not required in order to fix defendant's liability after his negligence has been established and resulting injuries to the plaintiff to show in addition thereto that the consequences of his negligence could have been foreseen by him. It is sufficient that it be

shown that the injuries are the natural, though not the inevitable, result of defendant's negligent fault; such injuries as in ordinary circumstances are liable to ensue from the act or omission charged. \* \* \*

In *Washington & Georgetown R. R. Co. etc. v. Hickey*, 41 L. Ed. 1101, the driver of a street car attempted to cross a railroad track in front of a rapidly approaching train which was so near that the least delay in crossing would probably lead to an accident. The gateman lowered the crossing gates so as to pen the car on the track. It was held that the two negligent acts of the two companies constituted a single cause of concurring negligence and the proximate cause of the accident; that insofar as the driver of the street car was concerned it was enough that he should have anticipated that *any* delay of *any* kind from *any* one of a hundred different causes would result in an accident and that it was not necessary that the driver should foresee the very thing itself which did cause the delay—"the material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gate-keeper in wrongfully lowering the gates. The act of the driver being a negligent act and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent acts the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horsecar company."

The particular accident which occurred need not be foreseen—it is sufficient that any accident might have and should have been anticipated.

- Pennell v. Rumley Pro. Co.*, 159 Wis. 195.  
*Helen v. Supply Ldry Co.*, 163 Pac. 9.  
*Branegan, etc. v. Town of Verona*, 174 N. W. 468.  
*Barabe v. Duhrkap Oven Co.*, (Mass.) 121 N. E. 415.  
*Ogden v. Aspinwall*, 220 Mass. 100.  
*Doyle v. Chicago, St. P. & K. C. R. Co.*, 77 Ia. 607.  
*Cinn. etc. R. Co. v. Padgett*, 158 Ky. 301.  
*Mitchell v. Schofield's Sons & Co.*, 16 Ga. App. 686.  
*Mast v. Borneman & Sons Co.*, 111 N. E. 949.  
*King v. Inland Steel Co.*, 96 N. E. 337.  
*Regan v. Cummings*, 117 N. E. 800 (Mass.).  
*Hudson v. Seaboard, etc. R. Co.*, (N. C.) 97 S. E. 388.  
*Memphis Com. Gas & El. Co. v. Creighton, et al*, 183 Fed. 552.  
*Coel v. Green Bay T. Co.*, 147 Wis. 229.

Where negligence caused injury the results will be held to have been foreseen.

- Benton v. St. Louis*, 248 Mo. 98.  
*Gulf & S. Fe. R. Co. v. Smith*, 148 S. W. 820.  
*Collins v. Pecos & N. T. R. Co.*, 212 S. W. 477.  
*Vicksburg S. & P. Ry. Co. v. Jackson*, 133 S. W. 925.  
*Woodson v. Met. St. Ry. Co.*, 224 Mo. 685.  
*Washburn v. Laclede Gas Co.*, 214 S. W. 410.  
*Furkovitch v. Bingham Coal Co.*, 45 Utah 89.  
*Hill v. Winsor*, 118 Mass. 251.  
*Washburn v. Laclede Gaslight Co.*, 223 S. W. 725.  
*Illinois Car etc. v. Brown*, (Ind.) 116 N. E. 4.  
*Greer v. St. Louis etc. R. Co.*, (Mo.) 158 S. W. 740.  
*Bunting v. Hogsett*, 139 Pa. St. 363.  
*Cleveland etc. R. Co. v. Clark*, (Ind.) 97 N. E. 822.  
*Irby Lbr. Co. v. Bratcher*, (Tex.) 191 S. W. 700.  
*El Paso S. W. R. Co. v. Barrett*, 101 S. W. 1025.  
*Galveston etc. R. Co. v. Cook*, (Tex.) 214 S. W. 539.

**The particular results need not have been anticipated.**

*A. T. & S. F. R. Co. v. Parry*, 67 Kan. 515.

*Ill. Cent. R. Co. v. Silor*, 229 Ill. 390.

*Gulf etc. R. Co. v. Gentry*, (Tex.) 197 S. W. 482.

*Seckinger v. Mfg. Co.*, 129 Mo. 591, 603.

*Houston Chron. Pub. Co. v. Lemmon*, (Tex.) 193 S. W. 347.

*Dixon v. Schott*, 181 Ill. 116.

*White v. Sharpe*, 219 Mass. 383.

*Chicago Veneer Co. v. Jones*, (Ky.) 135 S. W. 430.

*Ft. Worth Belt R. Co. v. Cobell*, 161 S. W. 1083 (Tex.).

*LeBeau v. Minn. etc. R. Co.*, 164 Wis. 30.

*Norfolk etc. R. Co. v. Whitehurst*, (Va.) 99 S. E. 568.

*L. & N. R. Co. v. Wright*, (Ky.) 210 S. W. 184.

*Phillips v. St. L. & S. F. R. Co.*, 211 Mo. 419.

*Christianson v. Chicago, St. P. & O. R. Co.*, 67 Minn. 94.

*Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576.

*Isham v. Dow*, 70 Vt. 588, 591.

*Wash., Alex. & Mt. V. R. Co. v. Luken*, 32 App. D. C. 442.

*Mesa City v. Lesueur*, (Ariz.) 190 Pac. 573.

*Watt v. Evans etc. R. Co.*, 129 N. E. 315.

**The fact that an unusual accident occurs is no defense.**

*Munsey v. Webb*, 59 L. Ed. 162.

*Texas & Pac. R. Co. v. Carlin*, 111 Fed. 777 (aff. 47 L. Ed. 849).

*Dean v. Railroad*, 199 Mo. 386.

*Jackson v. Miss. Tel. Co.*, 26 L. R. A. 102.

*El Paso & N. W. Ry. Co. v. McComas*, 36 Tex. Civ. App. 170.

*Gellar v. Briscoe Mfg. Co.*, 136 Mich. 330.

*Ft. Worth v. Patterson*, 196 S. W. 251.



*Lilly v. N. Y. C. & H. R. R. Co.*, 107 N. Y. 566.

*Reed v. Mo. K. & T. Ry. Co.*, 94 Mo. App. 371, 381.

*Doyle v. Chicago, St. P. & K. C. R. Co.*, 77 Ia. 607.

*White Sew. Mach. Co. v. Ritcher*, 2 Ind. App. 331.

*Texas & Pacific R. Co. v. Carlin*, *supra*, was an action by a servant against the railroad company for injuries sustained by being struck by a maul which the foreman negligently left on the track so that it was struck by a train and thrown 20 feet against plaintiff. Defendant relied upon the unforeseen and unanticipated doctrine. The Circuit Court of Appeals held:

"It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. *Just such an occurrence was not to be anticipated.* The defendant requested the trial judge to instruct the jury that, although they may find that the foreman failed to discover the maul, 'yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant.' The court did not err in refusing to adopt this view of the case. It may be true that the accident in *its extraordinary form, with its peculiar circumstances*, could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results, which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But, if it was negligence likely to produce other and familiar injuries, the peculiarity of the acci-

dent does not prevent liability. (*Doyle v. Chicago, St. P. & K. C. R. Co.*, 77 Iowa 607, 4 L. R. A. 420, 42 N. W. 555). The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable. \* \* \*

In *Munsey v. Webb*, *supra*, the court held that while it was not to be anticipated *specifically* that a man from internal causes, would drop into an open door of an elevator and receive injuries as it passed upward; that there was a possibility and danger that in some way some one in the elevator would get some part of his person outside of the car when in motion and that such a circumstance was obvious; that omission to close the door constituted negligence which "very properly could be found to have been the proximate cause of the death." It was noted that the negligence was merely a passive omission of duty to close the elevator door, but this omission was deemed sufficient under the rule in the Kellogg case (94 U. S. 469).

*Cincinnati N. O. & T. P. Ry. Co. v. Padgett*, 158 Ky. 301, is a case where a railroad company allowed a stick of dynamite to remain in a pitch bucket, where covered with pitch; the act of negligence was held the proximate cause of injury from an explosion later, occurring when one of the men used it as a receptacle for burning rags to drive off mosquitos. The court also held the railroad company could not escape liability because it could not foresee the bucket would be used to burn rags—it could appreciate that some kind of accident might occur with this dangerous material.

*Northrup v. Eakes*, 178 Pac. 266, was a case where several lessees of oil lands negligently permitted crude oil to escape

into creek where it became ignited by some stranger, extending to and burning property close to the stream. It was held the acts of exhausting crude oil in the stream was the proximate cause of the damage, even though a stranger ignited it, the rule announces a man is liable for his negligence in very clear language, then says:

"Tried by this test, it appears to us that the act of defendant in negligently discharging crude oil, a highly inflammable substance, into the stream above plaintiff's barn was the proximate cause of the injury, for the reason that the injury done by the floating oil ought to have been foreseen, in the light of all surrounding circumstances. *The defendants cannot be heard to say that they did not know the crude oil was inflamable, or that they had no reasons to believe that crude oil, which they negligently allowed to flow into the creek, would become ignited and be driven by the winds and the natural flow of the stream upon plaintiff's premises. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result.*"

The court, in the case above, cited *The Santa Rita*, 176 F. 890, 100 C. C. A. 360, where it was held, the discharge by a steamship of fuel oil into the water, which floated under the wharf and matted with inflammable rubbish was the proximate cause of burning another vessel, although the oil was ignited by an independent innocent act of a stranger throwing a lighted cigar into the water.

(c.) ARGUMENT ON UNFORESEEN DOCTRINE:

We have exhaustively examined cases on this question and will give the court their essence boiled down, and in our language

The outstanding point is that one established by this court in the *Kellogg* case (94 U. S. 469) as follows:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is

not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it."

No real lawyer ever claimed any right to recover unless the injury resulted from some wrongdoing, which is ordinarily negligence.

Negligence always involves an element of culpability. Without that something it is not negligence. No one is negligent who obeys the law and who is careful to avoid the probability of any injury to his fellow men. If one, using such care, while moving about, and indirectly injures another without intention, and without carelessness, but purely unavoidable, in the face of every reasonable care, such injury is called a pure accident. It is not actionable. One pursuing his duties in a lawful and careful manner is not chargeable with foresight to any such extent as one who is negligent, because law and duty has chosen the less dangerous path and injury is not probable in such a course.

The other extreme or contention is the one our adversaries take, proclaiming he shall not be liable unless the injury is the result of a particular knowledge that the injury happening would happen. That theory embraces the criminal, who, of course, is punished for such conduct. This, however, is not a wrong of neglect or negligence, but it is an intentional wrong. (He is, of course, liable for civil damages for intentional wrongs, as well as punishment, but we are discussing negligence.)

Between these extremes of criminal responsibility and innocence there lays a field of civil liability—negligence—sounding in tort. All who do not foresee any *definite particular injury* to any one in particular but who carelessly, or thoughtlessly, act violative of law or duty, conscious—or accountably conscious—that some injury of some kind may, on that account, happen to somebody, are liable for any and all of the injuries that directly flow from the misconduct.

This field of negligence may be separated into two natural divisions, viz:

*First.* Negligence of those who while violating statutes, ordinances, positive duties or inhibitions of common law and because of the act of violation, injure others, are liable, civilly, to the persons injured. It is for neglect of law—neglect of duty and is compensatory.

*Second.* Negligence due to failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or of doing what such a person under such circumstances would not have done.

(1) Under the first class of negligence (injury to private individuals because of neglecting to obey laws or positive duties) *proof of one of the elements essential in the other class is not inherent. It is never necessary to prove anticipation of injury, or that that injury, or any injury, was foreseen.* This is because it is immaterial whether the person actually guilty of negligence anticipated or not. The law-makers did the foreseeing and anticipating for him. In other words, they took away that element in certain cases. The fact that there *was* danger, *is the reason* for the law, or duty. Therefore, the individual, in a sense, is presumed to have foreseen, as he will not be allowed to defend on the ground that he *did not* foresee. Proof under this class of cases ordinarily requires but two elements, (a) breach of law, (b) damages or injury resulting from the breach.

(2) Now as to the second division of negligence (or failure to do or not do what a reasonable person would under the same circumstances) we have a sort of self-adjusting automatic system of law-making set up in the mind of every man. He must know his duty, under the circumstances confronting him. It is shifting. He is liable for damages to his fellow man for neglect of that duty. This duty primarily must be determined by the man called upon to act. He must

impose these rules upon himself and obey as a reasonable man would do.

In this class of cases, where there is no violation of law or positive duty, and a man is pursuing his usual vocation, and his conduct, as a circumstance of an injury, is subject to inquiry for civil liability, three things are essential to prove viz: (a) *a duty or obligation* must be proved—or *anticipation* which presents the duty. (This duty takes the place of a law we are presumed to obey in the first class.) (b) A breach of that duty or obligation, and (c) the injury or damages suffered.

In this second class of cases, where a man *is not* violating *positive duties or laws*, but is *pursuing rightful occupations* or pleasures we cannot make him guilty of negligence, no matter how bad the injury, *unless we prove he neglected to do or refrain from doing as the ordinarily careful and prudent man would have done under the same circumstances*. In order to prove this *in rightful pursuits* you are bound to show *that injury should have been anticipated or foreseen*. *Not particular injury to the particular person as it happened*, but you must show that the circumstances were such that the ordinarily prudent man would know the act *would probably injure someone in some manner*. It is just a process or way of reasoning out whether or not a person enjoying his own rights was careless or reckless of the rights of others. The anticipation, or foreseeing, and neglecting to be governed *by this knowledge of danger* is the self-created law upon which you are held to accountability. You cannot escape it by saying you yourself did not see it—because the standard is, whether a reasonable person under those circumstances could have seen it and therefore whether you should have seen it. And you cannot say you did not know that kind of an injury could result, because in the same way the answer is: you should have anticipated that some injury was liable to occur to some person.

So that to be guilty of negligence in this class of cases it must be shown that *there was the element of foreseeing*—that he could anticipate danger and neglected to be cautious in such a situation or in view of this knowledge. Let us illustrate:

A man racing on a training track upon his private enclosed ground is not violating any law, obligation, or duty, and hence not guilty of any negligence. But the same man seeing a child toddling alone close to the track *by his foresight* and disregard of same may become guilty of negligence from this element. *His foresight alone and the circumstance is the basis for negligence.* Again, if so driving and having no knowledge of a child being in the vicinity, who suddenly steps out, under these circumstances the *unforeseen element saves him from negligence.*

Because such a large number of cases involving the element of anticipation or being unforeseen, has caused many superficial students of the question to believe that that element—*was an inherent part of every case and of every element of a case of negligence.* They supposed in every case the particular injury had to be foreseen. In the same way they supposed even the extent of the injury had to be foreseen.

This element of anticipation *only goes to the extent*, or is used for the purpose of determining, whether a man is *careless or negligent.* That is all that is meant by being unforeseen. It is just another way of reasoning whether a man was negligent or not. Whenever the unforeseen argument is used the "unforeseen" must be so used as to determine whether the act was a dangerous act, or so disassociated with culpability as to have made a case *entirely of no negligence and no breach of duty.* That is why "unforeseen" is no defense in neglect of law-obedience, positive duties, rules of employment or negligence *per se.*



When in the second class of cases (where men are violating no law or duty but nevertheless cause an injury) anticipation is necessary to be proven and his neglect to act as a prudent man is shown.

From this testing formula, whether named as an unforeseeable doctrine—or lack of anticipation—having been used only to ascertain if negligence existed, has caused the unthoughtful to think the element of being “unforeseeable” must exist in every case, whether or not negligence could be established independent of the foreseeable result. Accordingly the ultra defender and fighter of all liability for any negligence, so urges, and he even contends that to be liable he has in every case to foresee not only an accident as probably resulting from his conduct, but in addition thereto the specific accident, the manner of its happening, the injuries resulting, and the extent of those injuries even contending where an unusual result ensued he should be excused. They are like the old doctors who discovered the medicinal properties of calomel and quinine in a few cases and gave it in all—the bleeders bled, and the vaccinators vaccinated—as the appendix experts cut the bowels out of men, so do these lawyers overwork the sane and sensible use of the element of foreseeeness. Because it has been used to *establish negligence in some cases*, they say foreseeeness must be shown in *every* case, or if not shown, there is no liability.

The courts, however, have refused to follow these contentions and have uniformly held that the unforeseen doctrine applies only to the second group of cases and then only to the extent of determining the one question of whether or not the defendant was negligent. Negligence being established the doctrine becomes surplusage. It is never applied so as to hold that the *specific accident* must be foreseen, nor the *manner* of its happening, nor the resulting *injury* nor the *extent* thereof; and the fact that an unusual result follows is immaterial.

The act of omission or commission is to be viewed as through the eyes of a theoretical man—that fictitious reasonable and prudent person judging the actions by what such a person would have done under the same circumstances. *If it be found he acts contrary to what such a person would have acted, causing injury, flowing naturally and directly, in an unbroken chain without an intervening, efficient independent cause interrupting, then he is liable. His liability is for whatever would probably result in any or some injury, of any or some kind, to any or some person. If the injury lands anywhere in this field, in such an unbroken chain, such negligence is the proximate cause and the defendant is liable without regard to whether the negligent man did in fact foresee the particular person, the particular accident, the particular injury or the particular further result.*

On the same reasoning there is nothing in anticipation and remoteness—these variations of unforeseenness—excepting to eliminate superfine philosophies and refinements beyond common reasoning, which sophists sometimes urge to try and build up and establish negligence. When they get *so fine that there is no negligence*, the theory is good.

Now, *just plain common reasoning* is the backbone of this case and all such cases. Was there negligence? Was the plaintiff injured as a direct result of this negligence?

*Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, quoted by Petitioner, does not bear him out, but on the contrary sustains our verdict.

This is the case where it was charged defendant negligently approached his own tall inflammable elevator with his own boat on the Mississippi River, while emitting sparks and in a high wind blowing towards his elevator. The elevator burned and from this plaintiff's sawmill and lumber 388 feet away caught fire. The defendant on account of this great

distance asked an instructed verdict on the ground the last burning was too remote from the negligent approach to the elevator as stated. The trial court refused this and left it to the jury to find whether the burning of the mill and lumber was naturally and reasonably to be expected under those circumstances, and whether this happened without the aid of other causes not reasonably to be expected.

There was no question about it being negligence to approach even his own inflammable elevator with sparks emitting from his boat when a high wind was blowing toward it.

The point they make was that because plaintiffs' mill and lumber was 388 feet from the elevator it should not be considered as an approximate result foreseeable.

This court said (bearing in mind that the primary act was negligent) :

*"Did the facts constitute a continuous succession of events so linked together as to make a natural whole or was there some new and independent cause intervening between the wrong and the injury?"*

The above statement directly followed the statement of the refusal of the court to instruct as a matter of law, and the statement of what the trial court did in fact instruct, which was this court's announcement of the governing principles.

The court then said as a proviso to these general principles regarding "continuous whole" what Petitioner quoted, to-wit:

*"But it is generally held that in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that*

it ought to have been foreseen *in the light of the attending circumstances.*"

Then applying this proviso the court said that these circumstances were the velocity and direction of the wind, the dry season, sparks, height of elevator and all. The court says *under those circumstances* the defendant would *expect more danger* than at another time and under different conditions.

Then, as a second proviso, the court says:

"We do not say that *even* the natural and probable consequences of a wrongful act or omission are in *all* cases to be chargeable to the misfeasance or non-feasance. They *are not* when there is a sufficient and independent cause operating *between* the wrong and the *injury.*"

Now, see how this court brings it back to the fundamental principles of "continuous succession" of events and after dealing with above provisos, the court says:

"*But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault and self-operating which produced the injury.*"

This close analysis contrasts with remarkable clearness with cases where the doctrine of unforeseenness and anticipation has been applied in improper places by legal refinements and acute minds.

The real question of that case, was, did this fire naturally flow from the one *wrongfully* set or did some other independent agency communicate it across? There was no intervention.

The case at bar comes within the first group of cases where the act complained of is a *violation of a positive duty* and an act of Congress requiring safe and sufficient material and

making them liable for any negligence. Anticipation was not necessary to be proven. It was enough that an injury occurred through the failure of the master to perform the positive duties of furnishing safe materials properly inspected. The courts through the announcement of the duties of the master did the foreseeing in all such cases.

As a matter of fact if this case was within the second group of cases for negligence—due to failure to do what a reasonably prudent person would do under the circumstances—liability could not be avoided under the facts proven. Indeed the facts are so strong that there would be liability under Petitioner's reasoning because a probable injury should have been foreseen from a neglect to inspect and reject a wire with a copper cylinder attached when found as mere flotsam and jetsam in an empty coal car.

Briefly stated, the Kellogg case held: Whether a defendant should have foreseen ill-effects from his conduct is a question of fact for the jury. This is true even where connected with independent circumstances, unless it clearly appears that the extraneous circumstances constituted an efficient independent cause from which the effects would have flowed even in the absence of defendant's conduct. Where the effect, however, flows in an unbroken chain from defendant's conduct, without efficient cause intervening, the defendant's conduct will be held to be the proximate cause of the effect.

In the case at bar the negligent act of finding wire from questionable source and of failure to inspect and test being both shown and admitted in the answer and no independent efficient intervening cause whatsoever, being shown the question was properly submitted to the jury.

As before stated the "unforeseen" and "unanticipated" tests are used only for the purpose of determining *negligence*. If negligence can be and is established independently of these tests then these tests are surplusage and never resorted to.

In the case at bar negligence was established by proof of failure in furnishing safe materials and a failure to inspect. Although the presence of the cap upon the wire and the place of its procurement were both circumstances involving this duty which as hereinbefore shown, made the failure of the master to perform these duties guilty of culpable negligence.

(d) ASSUMPTION OF RISK.

At page 52 of his brief Petitioner advances the claim that Respondent assumed the risk of the injuries he received. He cites the following four cases which will be forthwith considered :

*Jacobs v. S. R. R. Co.*, 241 U. S. 229: Deceased, while carrying a water cooler in his arms, attempted to run along the track and board a moving train at a place where he *knew* it was customary to scrape out cinders. This was a case involving *known* dangers and is not an authority in the case at bar where the master's negligence and dangers were both *unknown* to Respondent.

*Prior v. Williams*, 254 U. S. 43, the claw bar case, has no application because the case went off on instructions. It was not assumption of risk as a matter of law or the court would have ended the case instead of remanding it. It was held to be a question for the jury under proper instructions as to whether a reasonable person in the same situation would or would not have used the claw bar. In the case at bar it was all submitted to the jury upon evidence of negligence. This case is an authority, however, that the question is a jury question.

*Vanderpool v. Partridge*, 79 Neb. 165: Plaintiff was injured by a chisel he saw made from a rasp and knew to be unsafe and dangerous which fact he did not complain of to the master. He was not ordered to use this specific tool.

Under such circumstances it was rightly held he assumed the risk. The case is not an authority for the case at bar, as Respondent had no such knowledge as plaintiff in this case had.

*Boldt v. Pa. R. Co.*, 245 U. S. 441: This case held that the employee assumed such risks as are "fully known and appreciated by him." This rule has no applicability to the case at bar for the very material reason that Respondent did not "fully know or appreciate" the dangers to which Petitioner's negligence had subjected him. It is an authority only that Petitioner would have assumed the *ordinary* risk such as scratching his hands or face or tripping over the material while handling it—not the extraordinary dangers created by the Petitioner's own negligence.

The case at bar is not governed by the above authorities—but fall entirely within other rules of law, as will clearly appear from the following:

This was a question of fact for the jury.

Respondent was injured as a result of the master's own negligence creating an extraordinary danger of which Respondent had neither knowledge or warning of the dangerous materials furnished him with specific directions to use and of which hidden dangerous condition he had no opportunity to acquaint himself. Having neither knowledge of the master's negligence nor the dangerous condition of the material Respondent did not assume the risk.

This court stated in *Reed v. Director General*, 66 L. Ed. 480, 481:

"In actions under the federal act, the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant (or master) which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress



that every common carrier by railroad, while engaging in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

Respondent was injured by this dangerous material, procured without his knowledge from the rubbish in a coal car, furnished him, uninspected, by the Petitioner for a specific use. His injuries flowed directly from this negligence—and Respondent neither knew nor could be expected to find out in that instant of time the danger resulting from the master's violation of his positive duties. To the contrary, Respondent relied and had the unqualified right to rely upon the assumption that these duties had been fully performed by Petitioner, as shown by the following authorities:

18 R. C. L., Mas. & Ser. pars. 138 and 91.

In *Chicago, R. I. & P. R. Co. v. Ward*, 64 L. Ed. 430, 433, this court said of a brakeman thrown from the top of a freight car:

"\* \* \* As to the nature of the risk assumed by an employee in actions brought under the Employer's Liability Act, we took occasion to say in *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 315 \* \* \* 'According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employer's Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. (Citations.) Applying the principles settled by these decisions to the facts of

this case, the testimony shows that (Respondent) had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the master to perform his positive duties."

Quoted in *Johnson v. U. P. R. Co.*, 196 N. W. 140.

In *Union Pacific v. O'Brien*, 40 L. Ed. 766, 771, this court said:

"The servant undertakes the risks of the employment as far as they spring from incident to the service, but he does not take the risks of the negligence of the master itself."

In *Choctak etc. Co. v. McDade*, 48 L. Ed. 96, 100:

"The servant assumes the risks of dangers incident to the business of the master but not of the latter's negligence \* \* \*. The servant has a right to assume the master has used due diligence to provide suitable appliances in the operation of his business and he does not assume the risk of the employers' negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. \* \* \*"

See also:

*Roberts*, Fed. Lia. of Car., pp. 993, 990, 987.

*Union Stock Yards Co. v. Goodwin*, 57 Neb. 138.

*Cinn. I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 445.

*Balt. & Ohio R. Co. v. Baugh*, 37 L. Ed. 772, 781.

So in the case at bar, Respondent had no duty to ascertain from what source the master had procured the wire, nor the master's determination that it be used without inspection or test or inquiry as to what the cylinder on the end of it really was. Moreover, he had the right to assume proper inspection and test had been made, and it was entirely fit for use. This is established in the case of *Texas &*

*Pacific R. Co. v. Archibald*, 42 L. Ed. 1188, in which this court held:

"The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise or ordinary care, and that the employee has a right to rely upon this duty being performed, and that whilst, in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty (inspection) owing to the employee with respect to appliances furnished."

Even had Respondent a knowledge of the source from which this material was obtained with no knowledge that it had not been inspected and tested, he would not have assumed the risk as shown by the following from the syllabi in *Texas & Pacific R. Co. v. Archibald*, *supra*:

"An employee of a railroad company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because, by ordinary care, he might have known of the methods, and inferred therefrom that danger of insufficient appliances might arise."

This case was followed in a great number of cases as shown by Rose's notes, among them being the following cases permitting recovery where master had failed in duty of inspection (some emphasize the fact the question is one of fact for the jury):

*Francis v. Cramp & Co.*, 200 Fed. 383-386.

*Miller v. Missouri etc R. Co.*, 169 Fed. 567-570.

*Bunker Hill etc Co. v. Jones*, 130 Fed. 813-819.

*Maloney v. Winston Bros. Co.*, 18 Idaho 740-751.

*Miner v. Franklin Co. Telephone Co.*, 83 Vt. 311-320.

*Kiley v. Rutland R. Co.*, 80 Vt. 536-548.

Nor did the duty devolve upon Respondent to discover the danger. Anything short of positive knowledge of the danger is insufficient.

"The charge of the court upon the assumption of risk was more favorable to plaintiff in error than the law required, as it exonerated the railroad company from fault, if in the exercise of ordinary care, McDade might have discovered the danger. Upon this question *the true test is not in the exercise of care to discover danger*, but whether the defect is known or plainly observable by the employee."

*Choctaw etc. Ry. Co. v. McDade*, 48 L. Ed. 96, 100.

In *Mather v. Rillston*, 39 L. Ed. 464, a young man, inexperienced as a miner, but employed to operate the machinery in a house, for lowering timber into an iron mine and knowing little of the explosives used in the mine for blasting was permitted to recover from the operators of the mine for personal injuries to himself occasioned by their bringing into such house and storing therein near a steam heater a large quantity of giant powder or dynamite and these blasting caps which being jarred by the machinery and overheated by the steam and steam pipes suddenly exploded. It was held he did not assume the risk as he had not been informed of the increased risk and knew nothing of the special dangers resulting. In its opinion this court specifically noted the extreme sensitiveness and power of these fulminate caps (p. 467). It is not enough that Respondent had as good an opportunity as the Petitioner of knowing of the existence of the danger created by the master's negligence.

*Texas & Pacific Ry. Co. v. Archibald*, *supra*.

*Yazoo & M. V. R. Co. v. Dees*, 83 So. 613.

Respondent is not to be charged with scientific or technical knowledge as to what the cylinder was—no duty of inspection or test rested upon him. On the other hand, the Petitioner having the duty of inspection and test is so charged.

*McGill v. Mich. S. S. Co.*, 144 Fed. 788, *supra*, p. 78.

Respondent had no knowledge of the suspicious source from which this material had been obtained. He could not have assumed that risk. He did know that it had been presented to the foreman for his approval and had heard the foreman approve it with the admonition that its *quantity* might be insufficient; he did know that in addition his fellow-workman—older in years and experience—passed it to him for use. He had every reason to believe that the material was safe or it would have been discarded by his two superiors and not accepted for use. Respondent was but a mere boy, only 18 years of age, with no knowledge concerning the instrumentality nor any source or method by which to inspect or test it even had he desired so to do. All he could possibly have done would have been to again call it to the attention of the two superiors who had already passed upon it. Under these circumstances he proceeded to use the wire in accordance with the master's positive directions and in so doing was injured. Under the authorities considered, Respondent did not assume the risk. He was acting entirely within his rights, for, as above shown, he had the right to rely that the master had fully performed his duty of inspection and test and that the material was entirely safe, fit and proper for the use given him. He did not assume the risk as he had no knowledge of the master's negligence, nor of the unusual danger it created.

#### D. IN INTERSTATE COMMERCE.

##### (a) Gantry.

This gantry, a traveling crane, used to pick up heavy loads in cars and move them from a bad order car on one track to a good order car on a parallel track—is a unique bridge necessary to move interstate commerce. It stands there permanently while rope slings, chain slings and cable slings are a necessary part thereof, without which the rest of the machinery would be useless—just as bridges would be im-

paired without new bolts and materials to keep them in repair so as to be continued in use.

A gantry is unlike a refrigerator car or an engine that *may* be used for either interstate or intrastate commerce and not yet actually in use, because a gantry like a main track or bridge used for both kinds of traffic is constructively *always* in use for interstate business. It must always be ready for moving interstate traffic and any work for one kind of traffic involves the same work for the other. It is unlike an engine that may be and is withdrawn from interstate traffic and entered in intrastate service. Of course, an old gantry actually in use is different from a new one not yet being used.

The old cable sling had been broken in service and lost and this cable sling material had been brought up into immediate connection and use upon this gantry then in use. Moreover, the specific act was a necessary preparatory act in the movement of an interstate car of poles brought to the gantry and temporarily halted for this preparatory act necessary in moving across the state line to its destination.

On page 33 Petitioner asserts the record does not show gantry used *exclusively* in interstate commerce. We do not have to show a bridge or track is used *exclusively* in interstate business to bring it within the act if it was being used necessarily for interstate service. The evidence was that none of its employees knew of the use of this crane for any intrastate hauling and that all the use they had ever known of, was in interstate shipments and that this particular load of poles being move by these acts of repair was in sending these poles on their way from Minnesota to Nebraska. In fact, Petitioner admits this in his answer (Rec. p. 54).

Even had it been occasionally used for intrastate traffic (which was not shown by any evidence) its character as an instrument of interstate commerce would not be destroyed.

*Pedersen v. Delaware, Lack. & West. R. Co.*, 57 L. Ed. 1125.

*N. Y. Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260 (both cars).

*Erie R. Co. v. Winfield*, 244 U. S. 170.

*Lombardo v. Boston & M. R. Co.*, 223 Fed. 427.

We quote a part of our testimony, first to show gantry in interstate business and second the immediate connection of this sling with the repair of this operating gantry and also to show it was a preparatory act in the present movement of an interstate shipment, to-wit (Rec. p. 40):

24 Q. "When you speak of loaded cars that were usually brought in under the gantry for removal, were those removals from cars that were in local hauls within the state, or are these cars from through trains moving from state to state?"

A. "They were going out of the state, most of them, they come in from other state and go out."

25 Q. "Before you were hurt what was the last car that was unloaded?"

A. "A carload of sheet iron."

26 Q. "Was that a through car?"

A. "Yes sir."

27 Q. "And this came from outside of the state and coming through?"

A. "Yes sir."

28 Q. "And what next was to be moved, or do you know?"

A. "There was to be a carload of telegraph poles to the gantry that could not be reached yet and they were to be shoved by the engine as soon as we could get an engine."

29 Q. "They were not within reach of the gantry?"

A. "No."

30 Q. "But they were inside the yard?"

A. "Yes sir."



31 Q. "Had you received information that they would be pushed down next?"

A. "Yes sir. The foreman said it would be the next car."

32 Q. "What was necessary to be done in *preparation* for handling that load to go on its journey?"

A. "It had had a rope sling on to it for some time, and the foreman said it would not be strong enough, and he said they would have to make a steel cable to *transfer the poles*; that they were too heavy for the rope."

33 Q. "After that statement was made was there any direction given with reference to making that sling?"

A. "The foreman said to get the cable out of the shanty that we *had put in there*, and cut off a piece that would be large enough to make a cable sling."

34 Q. "Who got it, if you know?"

A. "I do not know exactly who got it from the shanty."

Record, page 55:

262 Q. "Did you have any other slings on the job at all there?"

A. "Yes, there was a rope sling and a chain sling."

263 Q. "And do you know why it was that one of those was not used for this particular load?"

A. "Well, sir, the rope sling was not heavy enough, and the chain sling would scar the poles by lifting them up with it."

264 Q. "Now, after the order was given by the foreman to make this cable, what if anything was done?"

A. "The men went in and got the cable and brought it out there to—and cut off enough to make the sling out of."

265 Q. "Where did they get the cable?"

A. "Out of the shanty."

266 Q. "Was it a new cable or old?"

A. "It was an old cable that *had been used* there by the hoist at one time."

275 Q. "What, if anything was done?"

A. "He told us we would have to get some wire and cloth to put around the ends of it to keep from scratching our hands."

276 Q. "Who told you that?"

A. "The foreman."

277 Q. "In putting the clamps on the cable where was the cable at the time the clamps were put on?"

A. "We had it on the ground. After we got the clamps on, part way, enough to hold it, we put it around the end of the coupler on the car and *up on the hoist, and raised it up to tighten it.*"

278 Q. "At that time you say the foreman said something about getting rags and binding them on the end of the cable?"

A. "Yes sir."

279 Q. "Did he do anything after that—the foreman?"

A. "He went up in the cab, and tightened up the cable, that was all."

280 Q. "He went in the cab?"

A. "*To tighten up the sling.*"

281 Q. "What, if anything, was done with reference to procuring some cloth and wire?"

A. "He told someone to get some wire and cloth."

282 Q. "Did anybody get it?"

A. "They got some cloth, *but there was no wire there.*"

283 Q. "Was there any wire on the job? "

A. "There was some heavy wire there, but it wasn't anything that you could wrap around the cable."

284 Q. "Did everybody know about the condition of affairs there?"

A. "Yes sir. That was the way about all the time."

285 Q. "Do you know whether the foreman knew that?"

A. "I suppose he did, the rest did."

286 Q. "Do you know whether the fact that wire was not on the job there had been reported to the foreman that day?"

A. "I don't know. I would not say it was not."

287 Q. "When he asked someone to get the wire, was the wire procured?"

A. "Yes sir, my father told—he told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that."

288 Q. "Your father got in the car and got the wire?"

A. "Yes sir."

289 Q. "And then what, if anything, did he do?"

A. "He asked the foreman if that was all right."

294 Q. "After you got the wire you say your father showed it to the foreman?"

A. "Yes sir."

295 Q. "I wish you would show the jury how it was displayed to the foreman?"

A. "What?"

296 Q. "How it was displayed to the foreman?"

A. "He held it up to the foreman and asked him if it was all right (witness illustrating)."

297 Q. "You saw him do that?"

A. "Yes sir."

298 Q. "And you heard him say that?"

A. "Yes."

299 Q. "What, if anything, did the foreman say?"

A. "He said it was all right, but there would not be enough of it. My daddy said it will have to do because that is all there is."

Record, page 61:

371 Q. "I will ask you what your duties at the gantry at that time, yours and that of the crew in which you were?"

A. "Transferring heavy material."

372 Q. "What?"

A. "The transferring of material from bad order cars into good ones, and fixing loads."

373 Q. "Transferring and fixing the loads?"

A. "Yes sir."

374 Q. "What do you mean by fixing them?"

A. "Sometimes a load would get out of shape on a car and before it could be forwarded it had to be straightened before it could proceed on its journey."

375 Q. "What was the character or the nature of the material that was being transferred or fixed in these cars?"

A. "Practically everything."

376 Q. "What?"

A. "Pretty near everything in the shape of heavy material. Guns, automobiles, tractors, steel, engines, and stuff like that."

377 Q. "No light stuff?"

A. "No."

378 Q. "How many loads would you handle in a day?"

A. "It depends on the condition of the load."

379 Q. "Did you ever have occasion to notice the tagging on the cars?"

A. "Sometimes the mans' name or the manufacturer was on, and sometimes it was not."

380 Q. "Did you ever get orders to, and did you ever transfer a load that originated in Iowa and that ended in Iowa, that was handled by your gantry?"

A. "I think not, no."

The work and material was immediately connected with this interstate aerial bridge or gantry actually in use and was being used then—was actually hooked upon the gantry as a part of it and the fixing or adjusting was directly connected with the movement of that particular car of poles in interstate movement as well as for movement of other interstate cars to follow.

It was more than a preparatory act but on actual moving act as much as the man that throws the switch for an interstate engine standing only for the switch to be thrown. Foreman Turner testified they were actually working on this shipment.

**(b) As to John O'Hara's work.**

Petitioner suggests on page 33 that as they had nothing to do they were making a sling, but evidence was in the record that the rope sling on hand was not strong enough and a chain sling would scar these telegraph poles—so this sling had been made and was even hooked on, in place, and had become a part of the gantry—a repair of an existing aerial bridge then being used in interstate commerce.

Petitioner at one time tried to show John was a volunteer and then again that he was at play and not at work of any kind either interstate or intrastate but indulging in idle curiosity, although defeated by the jury upon these suspicions injected into the trial against overwhelming proof. Then on the last two pages of his brief Petitioner tries to argue that the work he was doing was not in interstate commerce *even if assisting in adjusting this sling*. He attempts to segregate the sling from the gantry and call it a new instrument intended for, but not being in use, within some of the decisions on new trestles, new engines and new stations never having been opened to service and still independent of interstate commerce.

The test to determine whether Respondent was engaged in interstate commerce when injured has been determined by this court to be as set forth in the following cases. The leading case is *Pederson v. Delaware etc. R. Co.*, 57 L. Ed. 1125 (carrying bolts to the bridge), the court said:

“Among the questions which naturally arise in this connection are these:

"Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?

"Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

To the same effect,

*So. R. R. Co. v. Puckett*, 244 U. S. 571.

"Generally where applicability of the Employer's Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it."

*So. Pac. Co. v. Ind. Acci. Comm.*, 64 L. Ed. 258.

"\* \* \* This movement was simply for the purpose of reaching and moving an interstate car, the purpose would be interstate. *The difference is marked between a mere expectation that the act done would be followed by other work of a different character and in Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 478, \* \* \* and the doing the act for the purpose of furthering the later work (interstate commerce work)." Citing *Carr Case*.

*L. & R. Ry. Co. v. Parker*, 61 L. Ed. 119.

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

*N. Y. Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260.

The case at bar falls squarely within these tests.

In accordance with these tests this court has held:

1. The work of keeping instrumentalities used in inter-

state commerce in proper state of repair is so closely connected with such commerce as to be part of it.

*Pederesen v. Delaware etc. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125.

*Lombardo v. Boston & M. R. Co.*, 223 Fed. 427.

*Thomas v. Boston & M. R. Co.*, 219 Fed. 180.

*Deal v. Coal & Coke R. Co.*, 215 Fed. 285.

2. Preparatory acts for the purpose of furthering interstate commerce movement are in interstate commerce:

"From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave the operation the character of interstate commerce. The case is controlled by *Pedersen v. Del. etc.*, which holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act. (With citations there given)."

*So. R. Co. v. Puckett*, 244 U. S. 571.

In *No. Car. R. Co. v. Zachary*, 232 U. S. 248: An employee oiling an engine which was to go on an intrastate journey, and while hauling two empty freight cars that had come from without the state.

In *St. L. S. F. & T. R. Co. v. Seale*, 229 U. S. 156: A seal clerk in a division yard, inspecting and listing seals on an interstate train, preparatory to the distribution of its cars to other trains.

In *Norf. & W. R. Co. v. Earnest*, 229 U. S. 114: Fireman walking ahead of and piloting through several switches, a locomotive which is to be attached to interstate train and to assist in moving the same up a grade.



In *N. Y. C. R. Co. v. Carr*, 238 U. S. 260: Where brakeman on train consisting of several interstate and two of intrastate freight, is assisting in securely placing the latter on a sidetrack at an intermediate station to the end that they may not run back on main track and that train may proceed on journey with interstate freight.

In *M. K. & T. Ry. Co. v. U. S.*, 231 U. S. 112: An employee, who is waiting for the train to move and liable to be called and who is not permitted to go away, is on duty.

"They are none the less on duty when waiting. Their duty was to stand and wait." (p. 119).

In *So. Pac. Co. v. Indust. Acct. Comm.*, 64 L. Ed. 258: Electric lineman wiping insulators on main cable running from power house to a reduction and transforming station, whence current ran to trolley wires and thence to motors of carrier's cars engaged in both intrastate and interstate commerce, was in interstate.

In *So. R. R. Co. v. Puckett*, 244 U. S. 571: Plaintiff car inspector engaged in inspecting cars when wreck occurred among other cars nearby, blocking track and pinning man beneath car. Plaintiff went to get blocks to jack car up and was injured. Held while primary object to rescue fellow employee, yet was also for purpose of clearing interstate track of wreck and was in interstate commerce. Refers to preparatory acts as within employment.

In *Louisville & Nash. R. Co. v. Parker*, 242 U. S. 13: Plaintiff's interstate fireman on switch engine moving on switch track, transferring an empty car from one switch track to another, *which car was not moving in interstate commerce, but as movement was simply for purpose of reaching and moving an interstate car, the purpose controlled and plaintiff's interstate was held in interstate commerce.*

"The difference is marked between a mere *expectation* that the act done would be followed by other work of a

different character \* \* \* (citing *Ill. Cent. v. Behrens*) \* \* \* and doing the act for the purpose of *furthering* the later work. (Citing)."

In *Johnson v. So. Pac. Co.*, 196 U. S. 1: A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the *next trip*.

In *N. Y. Co. v. Porter*, 249 U. S. 168: A laborer shoveling snow between main line and platform at a station where tracks used for transporting both intrastate and interstate commerce, in interstate business and governed by Pedersen case.

In *Walsh v. N. Y. N. H. & H. R. Co.*, 223 U. S. 1: Car repairer replacing draw bar in a car then in use in such commerce.

Work being performed by O'Hara at time of injury was *preparation of gantry* which was being and had been long used for interstate freight, to transfer a waiting shipment of interstate freight, falls within the rule of preparatory acts of shipment—besides being work of repair on interstate instrumentality as stated above.

Transfer of interstate shipments from cars which have become in bad order in transit, to cars in good order, is as much a part of interstate transportation as the original loading thereof, and the placing of the shipment in cars is as essential to interstate transportation as is the having of cars in which they move or the engines and power by which moved, or the tracks and bridges over which they are hauled and such loading or transferring in transit under such circumstances is a true act of interstate commerce.

The particular repair of this gantry and its preparation to handle this particular load of interstate freight is a true act of interstate commerce.

(c) Question for jury.

*Pitts C. C. & St. L. R. Co. v. Glinn*, 219 Fed. 148.

*Nor. Car. R. R. Co. v. Zachary*, 232 U. S. 248.

*Penn. Co. v. Donat*, 239 U. S. 50.

*L. & N. R. Co. v. Parker*, 242 U. S. 13.

If this was a jury question it should not now be called a federal question.

We submit the court should affirm the decision of the court below or dismiss the writ of certiorari.

Respectfully submitted,

JOHN O. YEISER,

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*Attorneys for Respondent.*

BENJAMIN S. BAKER,

*Of Counsel.*

**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**OCTOBER TERM, 1924.**

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**Number 63.**

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**JAMES C. DAVIS, AGENT OF THE PRESIDENT,  
UNDER SECTION 206 OF THE TRANSPORTATION  
ACT, 1920,**

*Petitioner,*

**vs.**

**JOHN O'HARA,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA.**

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**PETITION FOR REHEARING.**

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*To the Honorable Chief Justice, and the Associate Justices,  
of the Supreme Court of the United States:*

John O'Hara, Respondent herein, by his Attorneys, respectfully presents his petition praying this Honorable Court to recall its mandate and grant a rehearing of the above entitled case heretofore decided at the present term, for the following reasons:

## I.

**This Honorable Court erred in holding that Petitioner's Special Appearance and Motion to Quash Summons, and proceedings thereunder, did not constitute a general appearance and a waiver of objection to the jurisdiction of the trial Court over Petitioner's person, as follows:**

(The record shows Petitioner, prior to answer, filed a special appearance, objecting to jurisdiction over his person and over the subject matter. This Honorable Court held the objection to jurisdiction of subject matter should be disregarded as (a) never carried into effect, (b) not being supported by the reasons assigned (Director General Orders), and (c) not questioning jurisdiction over subject matter over this class of actions.)

**A. This Honorable Court erred in holding the challenge to the jurisdiction of the trial Court over subject matter of the action was never carried into effect.**

This Honorable Court announced the Law that while the subject matter objection was plainly stated in the formal charging parts of the instrument, yet such objection should be disregarded if, construing the instrument in its entirety together with the proceedings had thereunder, it appeared such objection was not, in fact, intended—that it would be held not intended if it appeared that the grounds alleged (Director General orders) were not intended to support the *subject matter objection* and further that no effort was made by Petitioner to carry such objection into effect. Such is the Nebraska rule. (*Perrine v. Knights Templar*, 71 Neb. 267, 275.)

In this respect this Honorable Court overlooked the record showing Petitioner to have contended in the Supreme Court of Nebraska that:

"Actions for personal injuries growing out of Federal control of railroads are not transitory but are local under the plain terms of the order." (Add. Rec. p. 34);

that that Court devoted two pages of its opinion to an analysis and decision of this issue which it specifically noted as having been "strongly urged" by Petitioner (Rec. pp. 198, 199); that Petitioner came before this Honorable Court complaining of the Nebraska Supreme Court's adverse ruling thereon and seeking a reversal thereof, arguing:

"The Director General was sued in Douglas County. He was duly served with summons. The plaintiff did not reside in that county and his pretended cause of action did not arise therein. Under the plain terms of the order the Court was without jurisdiction. The defendant by his motion challenged the jurisdiction. The only question involved was the validity of the order. The question as to whether or not the cause of action was local or transitory was answered by the order itself in plain language. It was not transitory, except within the limits of the order. The very purpose of the order was to make what had theretofore been a transitory cause of action a local cause of action, statutes and decisions to the contrary notwithstanding." (Brief of Pet. on Pet. for Cert. p. 2);

and that Petitioner never abandoned such contention. (Brief of Pet. p. 16.)

Whether an action is transitory has nothing to do with jurisdiction of person but concerns subject matter only (15 C. J. 734, 737, *Perrine v. Knights Templar*, 71 Neb. 267, 275).

The record further shows Petitioner contended the order so completely removed jurisdiction from the Douglas County District Court that that Court was without jurisdiction even if defendant filed a general appearance. (Brief of Petitioner,

p. 16.) (General appearance always waives objection to jurisdiction of person but never of subject matter. 15 C. J. 801, 7 R. C. L. 1044, paragraph 77).

**B. This Honorable Court erred in holding that "the stated purpose of the special appearance was broader than the grounds alleged and unsupported thereby."**

Petitioner's arguments, as hereinbefore shown, were based exclusively on the very grounds set up in the special appearance—Director General's order—on which he sought too broad a construction.

This Honorable Court overlooked the decision of *Perrine v. Knights Templar*, supra, in which defendant raised

"\* \* \* the legal question whether or not the alleged cause of action set forth in the Petition was local or transitory. The challenge was made to the Court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point—as was done—of the truth of these allegations, we can come to but one conclusion, and that is that it was the intention of the pleader to challenge the jurisdiction of the Court over the subject matter, and that he has done so both by his averment and by the evidence" (arguments).

**C. This Honorable Court erred in holding Petitioner did not intend the objection to question the power of the Court to adjudicate concerning the subject matter of the class of cases to which plaintiffs' claim belonged.**

Petitioner's object was to have the Court pronounce a decision that this order made every action local and not transitory and that courts of states foreign to the place of



injury or plaintiff's residence at the time were deprived of the power to act.

## II.

**This Honorable Court overlooked the rule of practice in Nebraska that when a special appearance to object to jurisdiction of the person joins an objection to jurisdiction of subject matter the appearance is not special, but is general, and constitutes a waiver of objection to jurisdiction over the person.**

An objection to jurisdiction over the person so waived cannot be reasserted by answer or otherwise:

Perrine v. Knights Templar, 71 Neb. 267 (keystone case), holding "to avoid an appearance, the objection must be confined to \* \* \* (objection to jurisdiction of person), has been the holding of this Court from its organization."

Clark v. Bankers Acc. Ins. Co., 147 N. W. 1118;  
Summitt Lumber Co. v. Cornell-Yale Co., 85 Neb. 468;

Legan v. Smith, 151 N. W. 955;  
Lillie v. Mod. Woodmen of Am., 89 Neb. 1;  
Brainard & Chamberlain v. Butler, 77 Neb. 515;  
State v. Westover, 107 Neb. 593.

The following Nebraska cases apply the same rule:

Maxwell v. Maxwell, (Neb.) 184 N. W. 227;  
McKillop v. Harvey, 80 Neb. 264;  
Bucklin v. Strickler, 32 Neb. 602;  
Plano Mfg. Co. v. Nordstrom, 63 Neb. 123;  
Montague v. Marunda, 71 Neb. 805;  
Herpolsheimer v. Acme Harvester Co., 83 Neb. 53;  
Bankers Life v. Robbins, 59 Neb. 170;  
Rabow v. Tate, 93 Neb. 198.

This Court, some thirty-five years ago in *Fitzgerald v. Fitzgerald*, 137 U. S. 98, *specifically recognized such to be*

*the established practice of Nebraska*, as well as in other Code States, and in that case affirmed such practice. This Fitzgerald case has become the settled law of this Court and a precedent upon this point in other jurisdictions as shown by 4 C. J. 1333 and Rose's Notes which specifically cite the following Federal cases:

Jones v. Gould, 141 Fed. 699 (defendant objecting to jurisdiction of Court over person and also subject matter (in special appearance) makes voluntary general appearance);

Mahr v. Union Pacific R. Co., 140 Fed. 924 (right to make special appearance not inherent, defendant challenging jurisdiction over both person and subject matter makes general appearance).

This Honorable Court overlooking above settled practice of Nebraska was diverted by the statute referred to and the following four cases which do not contradict the above settled principles.

**FIRST:** Section 8612, Comp. Stat. of Nebraska, 1922, provides that where defect is not shown on the face of the petition the objection may be pleaded in the answer with all other defenses.

*Hurlburt v. Palmer*, 39 Neb. 158, was a case where the objection did not appear on the face of the petition and *no special appearance whatsoever was filed*, but the objection was first raised by answer under that statute.

The case of *Kyd v. Exchange Bank of Courtland*, 56 Neb. 557, like the above case, was where the petition did not show defects and *no special appearance was filed*. The matter was raised only in the answer under the statute.

These two cases merely affirm the right granted by Section 8612.

In *Baker v. Union Stock Yards Natl. Bank*, 63 Neb. 801, as in the two preceding cases, *no special appearance was ever filed*. The Court, while affirming the statutory right, held that by failing to set it up in the original answer it was forever waived and could not thereafter be claimed by amended answer.

In *Templin v. Kimsey*, 74 Neb. 614, defendant made a special appearance limited to objection to jurisdiction over the person. This being overruled he thereafter filed an answer including this defense.

The basic element of the above four cases cited by this Honorable Court merely defines the *time* of claiming the privilege under Section 8612 of the Statutes of 1922. It may be taken for the *first time by answer* (*Hurlburt v. Palmer* and *Kyd v. Exchange National Bank*, *supra*); but not *after answer* (*Baker v. Union Stock Yards*, *supra*); and its being taken *too soon* is not fatal to the right to set it up by answer if taken by special appearance limited solely and exclusively to such objection (*Templin v. Kimsey*, *supra*).

The question of Nebraska Practice which controls the case at bar is not a question concerning the *time* of making the claim nor the right to make the claim by a Special Appearance limited to such objection, but grounds upon entirely different considerations and an entirely independent rule of law, viz: Whether a defendant, desiring to object to the Court's jurisdiction of his person prior to answer, must make such objection by Special Appearance limited solely and exclusively to such objection or whether he can make it by an instrument which includes other and additional objections. Nebraska courts have answered that the

contents of the instrument by which such claim is made *prior to answer* must be limited to that one and only objection and that a joining of any other objection in such instrument or the making of any additional objection therein constitutes a general appearance and a waiver of the objection to person.

This Honorable Court overlooked the fact that the Supreme Court of Nebraska did not hold the waiver of objection to jurisdiction over the person to have resulted from the act of *prematurely* claiming the privilege by Special Appearance prior to answer but because the rule hereinbefore discussed was not complied with *in that the substance of the instrument by which it was claimed was not a Special Appearance because not limited exclusively to such a claim.*

The holding of this Honorable Court stated its reasons for such holding to be that:

“Under the Statutes and practice in Nebraska, defendant was not required to appear specially to object to jurisdiction over his person. Where, as in this case, the defects do not appear on the face of the petition, objection to jurisdiction over the person of the defendant and over the subject-matter of the action may be taken by answer setting up defenses on the merits, without or after prior objection by a *special* appearance and motion.”

While this is a true statement of law it is also the statement of law wholly inapplicable to the facts in the case at bar because the record shows that the pleader sought to set up his objection to jurisdiction of person not “after prior objection by SPECIAL appearance and motion” but after a prior objection by GENERAL appearance.

It will be noted there is nothing in above four cases

which interferes with the rule that a general appearance is a waiver of the right to claim the privilege by answer and further that there is no conflict among the entire nineteen cases; that the practice has been consistent from its first announcement down to the decision in the case at bar; that there has been no contradiction or innovation of practice as this Honorable Court has been led to believe.

Because this Honorable Court erred in overlooking the matter hereinbefore mentioned it results that it failed to recognize that the case at bar is on all fours with and controlled by the case of *Perrine v. Knights Templar*, 71 Neb. 267, in all elements hereinbefore mentioned.

The holding of this Honorable Court that "even if the motion amounted to an objection to jurisdiction over subject matter it cannot reasonably be held to give the Court jurisdiction," is not according to the established practice of Nebraska nor supported by any authority.

### III.

**This Honorable Court erred in holding in respect to the objection to jurisdiction of person set up in the answer that**

"There is no reason why a defense pleaded but not urged at an earlier trial may not be insisted upon at a new trial."

*Moulou v. Am. Life Ins. Co.*, 28 L. Ed. 447, cited by the Court, is a case where two distinct, consistent and continuing defenses were pleaded *to the merits* and proof concentrated on one of these defenses. Upon second trial effort was devoted to the other defense: suicide, in an action on an insurance policy. This Honorable Court confused pure, or absolute and inherent defenses, going to the merits with a

waivable venue privilege (which was merely a plea in abatement, 1 C. J. 33).

(Privileges must be not only asserted but maintained by the party to whom allowed:

Gyer v. Irvin, 1 L. Ed. 762;

At. Coast Line Ry. Co. v. Mims, 61 L. Ed. 476, 478).

Under all codes, similar to that of Nebraska, such privileges may be pleaded in the answer with defenses, where the petition does not show the defect; but even though they may be pleaded together, nevertheless the common law rule has not been changed with reference to a prompt disposal of such dilatory or technical defenses, which must be disposed of promptly or before decision on the merits, or at most they must be urged and insisted upon during the trial or they will be considered as being waived or abandoned. (Some of these cases under the Code provision for joinder of all defenses in the answer show the Code States nevertheless adhere to the common law rule of the order of disposition—especially promptness—because among other things, of the very evil suffered in the case at bar, such as loss by statute of limitations, where a ruling is not promptly obtained upon a plea in Abatement and hold the defendant may not seek a judgment on the merits and reserve a ruling on his plea. Wisconsin, Kansas, Missouri and Oklahoma have Code provisions similar to Sec. 8610 and 8612 of Nebraska Statutes, 1922).

Barwick v. Am. Mfg. Co., 108 S. E. 119;

Stevens v. Lee, 78 Tex. 279 (8 S. W. 40);

Board of Supervisors v. Van Stallen, 45 Wis. 675;

Hill v. Walker, 167 Fed. 241, 245, 244;

Wells v. Patton, 50 Kan. 732;

Linney v. Thompson, 45 P. 456, 457;

Christenson v. Williams, 35 Mo. App. 297, 307, 301;

El Reno E. L. & Tel. Co. v. Jemison, (Okla.) 50  
 P. 144, 148;  
 Hicks v. Beam, 112 N. C. 642;  
 1 C. J. 258, 268, 272.

The following cases hold specifically that a defendant by failing to insist upon a plea to jurisdiction of person at first trial is estopped from insisting upon it on second trial:

Barwick v. American Mfg. Co., 108 S. E. 119;  
 Stevens v. Lee, 70 Tex. 279, 8 S. W. 40.

The statement that

“there is no reason why a defense pleaded but not urged at an earlier trial may not be insisted upon at a new trial”

is good law as to defenses going to the merits, but under all authorities has no application to a Plea in Abatement or privilege.

Petitioner should have taken the steps at the first trial that he took at the second trial.

#### IV.

**This Honorable Court overlooked the effect of its previous decisions, which were not overruled, holding, like the Nebraska Practice, that the allegations in the motion to quash need not be denied, and that such a motion should be overruled where no affidavit or evidence is offered by the moving party to sustain the same.**

The Supreme Court of Nebraska decided that the venue privilege as to place of suit was not properly raised, supported and presented to the highest Court of the State, because the motion to quash in the Special Appearance was not supported by affidavit or evidence and was properly overruled, and therefore even had it been presented by cross-



appeal (which was not done) there was no reversible error in the order.

This Honorable Court inferred that it was the duty of O'Hara to have denied the allegations in the Special Appearance and motion to quash, in effect saying that no evidence was necessary to support the allegations of the motion unless denied. This was emphasized by this Honorable Court by mention at several places in the opinion.

Under the Nebraska Statutes no provision is made for pleading to a motion or joining issue, but under the practice a counter-showing may be filed to meet the affidavits filed by the moving party. If the moving party files no showing, no controverting affidavits are required and the motion should be overruled. *Perrine v. Knights Templar*, 71 Neb. 267.

R. C. L., Vol. 19, page 672, states the general practice to be the same as we contend it is in Nebraska, and cites *Brownfield v. South Carolina*, 189 U. S. 426, 47 L. Ed. 882, wherein this Honorable Court said, speaking through Justice Holmes:

"It is suggested that the allegations of the motion to quash not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer \* \* \*."

While such an allegation is sometimes denied, a denial is not necessary, but under above and following cases evidence is the requisite that must be presented to sustain the claim.

*Smith v. State*, 40 L. Ed. 1082;

*Tarrance v. Florida*, 47 L. Ed. 572.

In the case at bar the reply was a general denied of all allegations in the answer. However, the Special Appearance constituted a general appearance before any answer was filed.

## V.

**This Honorable Court erred in classing waiver of privilege with unwaivable sovereignty exemption from suit.**

This Honorable Court announced the rule that this venue privilege would not be held waived unless such waiver was clearly made, citing cases concerning congressional waiver of the sovereign right not to be sued at all,—which can never be waived by the Attorney General, or any other authority but Congress.

In its opinion this Honorable Court expanded this sovereignty rule to apply to mere venue privileges, saying: The Director General

“will not be presumed to have waived any sovereign rights *or privileges* unless it has plainly done so.”

The cases cited were actions brought entirely beyond the congressional authorization; or brought beyond the period of limitations prescribed by Congress; or where the courts denied the validity of these orders and refused to allow the venue privilege; or for fines and penalties expressly excluded by Congress in said Section 10.

As a matter of law a different rule applies to waiver of venue privilege (a Plea in Abatement) than that of congressional waiver of sovereign exemption from any suit. Also a mere failure to promptly set up and thereafter insist upon such a plea of privilege estops the Government as well as persons from subsequently claiming its benefit. This is shown by the following cases, where mere failure by the

Government or others to promptly claim a venue privilege granted by a Federal law waives the privilege:

*Hvoslef v. U. S.*, 59 L. Ed. 813, 818;  
*Thames & Mersey, etc., v. U. S.*, 237 U. S. 19;  
*Panama Ry. Co. v. Johnson*, 68 L. Ed. 748, 751;  
*Lee v. Cheas. & O. Ry. Co.*, 67 L. Ed. 443;  
*Camp v. Gress*, 63 L. Ed. 997;  
*First Natl. Bank v. Morgan*, 33 L. Ed. 282, 284.

The case of *Alabama & V. Ry. Co. v. Journey*, 66 L. Ed. 154, held in discussing the Director General order that it was within the power of the Director General to prescribe the venue of suits and that this limitation was a reasonable *venue privilege*, which opinion places this provision as to place of suit in the same class of above cases.

In *Peoria & Pekin Ry. Co. v. U. S.*, 68 L. Ed. 427, interpreting the same kind of restriction as to place of suit in the Transportation Act of 1920, held that the limitation was not only a matter of *venue* but was a privilege also waivable. (It further held that a failure to cross-appeal was a waiver.)

Congress gave us the distinct, clear, right to sue for damages from negligence. The President, through the Director General, promulgated an order providing for special venue which was a mere privilege available in any manner recognized by the practice of the courts.

We had the right to sue and the Director General had a right to claim a privilege of the place of suit and the right to waive this privilege.

## VI.

This Honorable Court erred in its application of the law that it was not bound by the decision of the state court, and

that it may determine for itself whether the Director General sufficiently asserted and insisted upon his venue privilege and that this Honorable Court reserves the right to examine the facts upon the question of how a privilege is asserted and its sufficiency.

But, the question of waiving that right after having been asserted (if it was) is an entirely different question.

This Honorable Court in considering the asserting and maintaining of such right overlooked the question of the waiver of that right, which this Honorable Court explained in *Pierce v. Somerset Ry. Co.*, 43 L. Ed., p. 316, to-wit:

(Syl. 1.)

"The question whether a state statute impairs the obligation of a contract is a Federal question; but the question whether the defense of estoppel by laches and acquiescence is established is not a Federal question."

(Body P. 319.)

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one.

Eustis had a right which was protected by the Constitution of the United States. This right, the state court held, he had waived by his action, and this court said whether the state court was right or not was not a Federal question."

(Syl. 4.)

"Whether or not a person has lost a right under the Federal Constitution by his action or failure to act is not a Federal question-which will sustain a writ of error to a state court."

See, also, *Atlantic Coast Line Ry. Co. v. Mims*,  
61 L. Ed. 476, 478 (last para.). \*

The question whether Petitioner had the *right* to have this action tried in a particular venue was a Federal question. That right was sustained by the Supreme Court of Nebraska.

The decision of the Supreme Court of Nebraska that Petitioner had *waived* that right was based upon its established practice (which accords with the practice of all other jurisdictions)—was not rendered in the spirit of evasion—and was *not* a Federal question.

Therefore, under authority of *Pierce v. Somerset Ry. Co.* and *Atlantic Coast Line Ry. Co. v. Mims*, *supra*, this Court was without jurisdiction to review the holding of the Supreme Court of Nebraska in this respect.

Respectfully submitted,

..... *John O'Hara* .....  
..... *John C. Travis* .....  
Attorneys for Respondent.

The attorneys named, for John O'Hara, Respondent herein, do hereby certify that the foregoing petition subscribed by them, for and on behalf of John O'Hara, Respondent, is well grounded in law and is not filed for purposes of delay.

..... *John O'Hara* .....  
..... *John C. Travis* .....  
Attorneys for Respondent.

**DAVIS, AGENT OF THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,  
v. O'HARA.**  
**CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
NEBRASKA.**

No. 63. Argued October 10, 13, 1924.—Decided November 24, 1924.

1. General orders of the Director General of Railroads providing that suits against him must be brought in the county or district where the plaintiff resided at the time of accrual of the cause of action, or in the county or district where it arose, are in legal effect orders of the President and are valid. Federal Control Act, § 10, 40 Stat. 456. P. 317.
2. An action by an employee of the Director General for personal injuries sustained in the operation of a railroad under federal control is an action against the United States; and only to the extent clearly indicated by the Federal Control Act and orders of the Director General was the sovereign immunity from suit waived. *Id.*
3. Decision of a state supreme court that the Director General, by not sufficiently asserting and insisting upon it, waived immunity under the federal act and orders from being sued in the particular venue, does not bind this court on review. P. 318.
4. A special appearance for the declared purpose of objecting to jurisdiction over the subject matter, as well as to jurisdiction over defendant's person,—*construed* as confined to the latter point by the grounds set up in the motion to quash the summons. P. 318.

5. In Nebraska, objection to jurisdiction over the person, in a special appearance and motion to quash the summons for defects not apparent on the face of the complaint, is not waived by adding an unfounded objection to jurisdiction over the subject matter. P. 319.
  6. A motion to quash service and a defense, based on allegations of fact which show that the action is in a wrong venue, which are consistent with the complaint and not denied by the plaintiff, should not be overruled because the defendant did not bring evidence to sustain the allegations. P. 319.
  7. A defense well pleaded but not urged at a first trial may be insisted on at a second trial. P. 321.
  8. A ruling of a state supreme court that its former decision of a federal question became the law of the case on a second appeal, does not affect the power of this Court to examine the question upon review of the final judgment. P. 321.
- 109 Neb. 615, reversed.

CERTIORARI to a judgment of the Supreme Court of Nebraska which affirmed a judgment recovered by O'Hara in an action for personal injuries brought against the Director General of Railroads. The case went twice to the court below. 108 Neb. 74; 109 *Id.* 615.

*Mr. C. A. Magaw* and *Mr. N. H. Loomis*, with whom *Mr. A. A. McLaughlin* and *Mr. Edson Rich* were on the briefs, for petitioner.

*Mr. John O. Yeiser* and *Mr. John C. Travis*, with whom *Mr. Benjamin S. Baker* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

September 13, 1919, while employed by the Director General of Railroads in the operation of a railroad under federal control, plaintiff was injured by explosion of a blasting cap. The injury occurred at Council Bluffs, Iowa, where he then resided. He brought this action in the district court of Douglas County, Nebraska, to recover damages for his injuries. His petition did not show



where the injury occurred or where he lived when injured. The Director General appeared specially for the purpose of objecting to the jurisdiction of the court "over the person of the defendant and over the subject matter of this action", and moved to quash the summons; the grounds alleged were "that General Orders Nos. 50, 50-A, 18, 18-A and 18-B,<sup>1</sup> issued by the Director General . . . provide that all suits against the Director General of Railroads, as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose"; that plaintiff, at the time of the accrual of the cause of action, did not reside in Douglas County, Nebraska, and that the cause of action did not arise there. Plaintiff did not deny the allegations on which the motion was based. The district court overruled the motion without more. The defendant answered, setting up the same objection to jurisdiction and his defenses on the merits. Later, plaintiff filed an amended petition; and to that defendant filed answer, in which he again asserted his objection to jurisdiction. At the trial, after the evidence was heard, the court upon its own motion instructed the jury to return a verdict for defendant; and judgment was entered in his favor. The plaintiff made a motion for a new trial which was denied. He then appealed to the Supreme Court. Defendant's objection to the jurisdiction was urged by brief filed by leave of court specially given. But the question was not decided, because defendant had not taken a cross appeal. 108 Neb. 74, 81. The judgment of the district court was reversed on the merits. At the new trial plaintiff testified that his injuries occurred at Council Bluffs, Iowa, and that he resided there when he was in-

<sup>1</sup> See Bulletin No. 4, United States Railroad Administration, p. 186 (No. 18), p. 187 (No. 18-A), p. 334 (No. 50). Supplement to Bulletin No. 4, Revised, p. 55 (No. 18-B), p. 58 (No. 50-A).

jured. The defendant, by appropriate objections and motions made at the time of impaneling the jury, at the close of plaintiff's evidence, and at the close of all the evidence, insisted upon its objection to the jurisdiction of the court, but all were overruled. There was a verdict and judgment for plaintiff. Defendant appealed to the Supreme Court. A syllabus (by the court) contains the following: "Where the director general specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer." 109 Neb. 615. The judgment appealed from was affirmed.

Section 10 of the Federal Control Act, 40 Stat. 456, provides that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers except in so far as may be inconsistent with any order of the President." The general orders are in legal effect orders of the President, and are valid.<sup>2</sup> This is an action against the United States. The railroads were taken over and operated by it in its sovereign capacity, and it will not be held to have waived any sovereign right or privilege unless it has plainly done so. *DuPont De Nemours & Co. v. Davis*, 264 U. S. 456, 462; *Director General v. Kastenbaum*, 283 U. S. 25, 27; *Alabama, &c. Ry. Co. v. Journey*, 257 U. S. 111, 114; *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 562, 564. Its immunity from suit was waived only to the extent indicated by the statute and orders of the Director General.

Against his objection defendant could not be sued on plaintiff's claim in the Nebraska court. *Alabama, &c.*

<sup>2</sup> Proclamation of the President, March 29, 1918. (Bulletin No. 4, United States Railroad Administration, p. 20).

*Ry. Co. v. Journey, supra.* This Court is not bound by the decision of the state court that defendant waived his federal right under the act and the orders of the Director General, and it may determine for itself whether he sufficiently asserted and insisted upon that right. *Davis v. Wechsler*, 263 U. S. 22, 24; *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, 86; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261.

Defendant's special appearance and motion did not amount to an objection to the jurisdiction over the subject matter; that is, it did not raise the question whether, considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which plaintiff's claim belonged. *Cooper v. Reynolds*, 10 Wall. 308, 316; *Reynolds v. Stockton*, 140 U. S. 254, 268. The stated purpose of the special appearance was broader than the grounds alleged and, in so far as it related to the subject matter, was not carried into effect. There was nothing in the moving papers to suggest that the Nebraska court had no jurisdiction to try and determine actions, founded on negligence, to recover damages for personal injuries suffered by railway employees while engaged in the performance of their work. Undoubtedly, the district court of Douglas County would have had jurisdiction if the accident happened in that county or district, or if plaintiff resided there at the time he was injured. The general orders on which defendant's motion rested did not relate to jurisdiction of the subject matter; and the Supreme Court of Nebraska so held. The substance of the objection stated and the grounds alleged should control, rather than the declaration of purpose. See *Bankers Life Insurance Co. v. Robbins*, 59 Neb. 170, 173; *South Omaha National Bank v. Farmers & Merchants Bank*, 45 Neb. 29, 32; *Perrine v. Knights Templar's*

*etc. Co.*, (rehearing), 71 Neb. 273, 275. And,—even if the motion amounted to an objection to jurisdiction over subject matter,—it cannot reasonably be held that it gave the court jurisdiction. Under the statutes and practice in Nebraska, defendant was not required to appear specially to object to jurisdiction over his person. Where, as in this case, the defects do not appear on the face of the petition, objection to jurisdiction over the person of the defendant and over the subject matter of the action may be taken by answer setting up defenses on the merits, without or after prior objection by special appearance and motion. § 8612, Compiled Statutes, 1922. *Hurlburt v. Palmer*, 39 Neb. 158, 178, 179; *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557, 561; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 803; *Templin v. Kimsey*, 74 Neb. 614. And the rule that objections to jurisdiction over the person are waived by general appearance does not apply. It follows that, in such cases, there is no reason for holding that an unfounded objection to jurisdiction over the subject matter, in a special appearance and motion to quash the summons, waives objections to jurisdiction over the person. We hold that defendant did not by his motion waive his right to immunity from suit on plaintiff's claim in the Nebraska court or voluntarily appear and give that court jurisdiction.

As additional reasons for its conclusion, the Supreme Court said that the special appearance and motion to quash the summons were properly overruled, because there was no evidence to support the motion; that no objection was made during the first trial to the jurisdiction of the court, and that no motion for rehearing was made in that court after the filing of its opinion on the first appeal, "and the former decision of the court has become the law of the case".

The facts on which the defendant's motion was based were not denied by plaintiff. The order of the district

court states that "being fully advised in the premises, the court does overrule said special appearance . . . ." The order overruling the motion was made March 13, 1920, some time before the decisions of this Court which declared the validity and effect of the general orders on which plaintiff's motion was based. *Missouri Pacific R. R. Co. v. Ault*, *supra*, was decided June 1, 1921. *Alabama, &c. Ry. Co. v. Journey*, *supra*, was decided November 7, 1921. There had been a number of decisions holding general orders 18 and 18A invalid.<sup>2</sup> The record does not show whether the district court followed these decisions, or, as suggested in the opinion of the Supreme Court, based its ruling on a lack of evidence to support the motion. There was no issue as to the facts on which defendant's motion was based, and it could not reasonably be held that he was bound to bring forward evidence to establish statements consistent with the allegations of the petition, and which had not been questioned by plaintiff. Notwithstanding its reference to the matter, the Supreme Court, as we read its decision, did not hold that defendant's failure at the first trial to insist that the district court again rule on the objection to jurisdiction operated to deprive him of the right to do so at the second trial.

<sup>2</sup> General Orders Nos. 18 and 18-A were held invalid in *Friesen v. Chicago, R. I. & P. Ry. Co.* (U. S. D. C. Neb., Dec. 27, 1918), 254 Fed. 875; *Haubert v. Baltimore & O. R. Co.* (U. S. D. C. Ohio, Sept. 3, 1919), 259 Fed. 361; *El Paso & S. W. R. R. Co. v. Lovick* (Feb. 11, 1920), 110 Tex. 244, affirming Tex. Civ. App. (March 6, 1919), 210 S. W. 283, and overruling *Rhodes v. Tatum* (Tex. Civ. App., Oct. 16, 1918), 206 S. W. 114. See *Benjamin Moore & Co. v. Atchison, &c. Ry. Co.* (N. Y. S. C., January, 1919), 174 N. Y. S. 60. And they were held valid in *Wainwright v. Pennsylvania R. Co.* (U. S. D. C. Mo., Oct. 22, 1918), 253 Fed. 459; *Cocker v. New York, O. & W. Ry. Co.* (U. S. D. C. N. Y., June 15, 1918), 253 Fed. 676; *Johnson v. McAdoo* (U. S. D. C. La., May 8, 1919), 257 Fed. 757; *Klein v. Director General* (N. Y. S. C., February 20, 1920), 180 N. Y. S. 618. See *Russ v. New York Cent. R. Co.* (N. Y. S. C., Dec. 29, 1919), 179 N. Y. S. 310.



The objection was well pleaded as a defense in accordance with the Nebraska practice. There is no reason why a defense pleaded, but not urged at an earlier trial, may not be insisted upon at a new trial. See *Moulton v. American Life Insurance Co.*, 111 U. S. 335, 337. The ruling that the former decision of the state court became the law of the case does not affect the power of this Court to reëxamine the question. *Messenger v. Anderson*, 225 U. S. 436, 444; *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 257; *Georgia Ry. Co. v. Decatur*, *supra*, 437.

It must be held that defendant plainly asserted and reasonably insisted upon his immunity from suit on plaintiff's claim in the Nebraska court under § 10 of the Federal Control Act and the orders of the Director General. His objection to the jurisdiction should have been sustained.

*Judgment reversed.*